UNIVERSIDAD AUTÓNOMA DE MADRID

FACULTAD DE DERECHO

TESIS DOCTORAL

CONSPIRACY. A CONCEPTUAL GENEALOGY

(THIRTEENTH TO EARLY EIGHTEENTH CENTURY)

Autor

Víctor Manuel Saucedo Maqueda

Directores

Carlos Petit Calvo

Jesús Vallejo Fernández de la Reguera

Madrid, 2017

TABLE OF CONTENTS

ABBREVIATIONS

24 SS	Maitland, F. W, Harcourt, L. W. V., and Bolland, W. C. eds. *The Eyre of Kent. 6 &7 Edward II (A. D. 1313-1314).* Vol 1. In *Year Books of Edward II*. Vol 5. London: Bernard Quaritch, 11 Grafton Street, W. 1910
55 SS	Sayles, G. O, ed. *Select Cases in the Court of King's Bench under Edward I*. Vol 1. London: Bernard Quaritch, 11 Grafton Street, W., 1936.
57 SS	Sayles, G. O, ed. *Select Cases in the Court of King's Bench under Edward I*. Vol 2. London: Bernard Quaritch, 11 Grafton Street, W. 1938
58 SS	Sayles, G. O. Select Cases in The Court of King's Bench under Edward I. Vol. 3. London: Bernard Quaritch, 11 Grafton Street, W., 1939
85 SS	Cam., Helen M., ed. *The Eyre of London 14 Edward II (A. D. 1321).* Vol. 1. *In Year Books of Edward II. Vol 26 (Part 1).* London: Bernard Quaritch 11 Grafton Street, 1968.
Black Co	Blackstone, W. Commentaries on the Laws of England. 15th. Vols. 1-4. Edited by Edward Christian. London: Printed by A Strahan, Law-Printer to the King's Most Excellent Majesty, For T. Cadell and W. Davies, in the Strand, 1809 [1769].
Bracton	Bracton online. HTLM version of Bracton, Henry de. *On the Laws and Customs of England.* Latin edition by George E. Woodbine. Translated by Samuel E. Thorne. Cambridge (Mass.): Belknap Press in Association with the Selden Society, 1968. Last modified April 2003. http://bracton.law.harvard.edu/
Britton	Nichols, Francis Morgan, ed. *Britton. An English Translation and Notes.* Washington: John Byrne & Co., 1901. Redman, Robert ed. *Britton.* London: Imprinted at London in Flete streete by me Robert Redman dwellyng in saynt Dunstones paryshe at the signe of the George, 1540

Burn Eccl — Burn, Richard. Ecclesiastical Law. 2nd. Vol 1. London: Printed by H. Woodfall and W. Strahan, Law Printers to the King's most Excellent Majesty; For A. Millar; and Sold by T. Cadell, opposite Catherine-Street, in the Strand, 1767.

FNB — Fitzherbert, Anthony. The New Natura Brevium. 17th. London: Printed for Henry Lintot, Law-Printer to the King's most Excellent Majesty; and Sold by J. Shuckburch, at the Sun next *Richard's* Coffe-house in Flee-street, 1755 [1534].

Foster — Foster, M. A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery for the Trial of the Rebels in the Year 1746 in the County of Surry. Oxford: Clarendon Press, 1762.

Hale PC — Hale, Mathew. Historia Placitorum Coronae. Vols. 1-2. London: Printed by E. and R. Nutt, and R. Gosling, (Assigns of Edward Sayer, Esq;) for F. Gyles over-against Grays-Inn in Holborn, T. Woodward at the Half-Moon between the Two Temple-Gates in Fleet-street, and C. Davis in Pater-noster-row, 1736.

Haw PC — Hawkins, W. A Treatise of the Pleas of the Crown. 8th. Vols. 1-2. Edited by John Curwood. London: Printed for S. Sweet, 3, Chancery Lane; R. Pheney, Inner Temple-Lane; A Maxwell, 21, and R. Stevens and Sons, 39, Bell Yard, Lincoln's Inn; Law Booksellers and Publishers, 1841

HC — Rushworth, John. "Historical Collections: 1639, March-June." In *Historical Collections of Private Passages of State: Volume 3, 1639-40*. 885-946 London, 1721. British History Online. Accessed July 21, 2016. http://www.british-history.ac.uk/rushworth-papers/vol3/pp885-946

HCL — Langbein, John H., Renée Lettow Lerner, and Bruce P. Smith. *History of the common law: the development of Anglo-American legal institutions*. Austin: Wolters Kluwer Law & Business, 2009.

HCLE — Stephen, James Fitzjames. Vols. 1, 2, 3 of *A History of the Criminal Law of England.* London: Macmillan and Co., 1883.

HEL — Holdsworth, W. S. *A History of English Law.* 3rd. Vol. 2. London: Methuen & Co. Ltd, 1923.

Holdsworth, W. S. *A History of English Law.* 3rd. Vol. 3. London: Methuen & Co. Ltd, 1923 [1903].

Holdsworth, W. S. *A History of English Law.* 2nd. Vol. 5. London: Methuen & Co. Ltd, 1945[1924].

Holdsworth, W. S. *A History of English Law.* Vol. 8. London: Methuen & Co. Ltd, 1925.

Holdsworth, W. S. *A History of English Law.* Vol. 11. London: Methuen & Co. Ltd, 1938.

Hudson TSC — Hudson, William. "A Treatise on the Court of Star-Chamber." 1625. In Vol 2 of *Collectanea Juridica*, edited by F. Hargrave, 1-240. London: Printed for E. And R. Brooke, Bell-Yard, Temple-Bar, 1792

Inst — Coke, Edward. The Second Part of the Institutes of the Laws of England. London: Printed for E. and R. Brooke, Bell-Yard, Near Temple Bar, 1797 [1642].

Coke, Edward. The Third Part of the Institutes of the Laws of England. London: Printed for E. and R. Brooke, Bell-Yard, Near Temple Bar, 1797 [1644].

Mirror — Whittaker, William Joseph, ed. *Mirror of Justices.* London: Bernard Quaritch, 15 Piccadilly, 1895

Saunford PC — Staunford, W. *Les Plees del Coron divisees in plusiours titles*. London: Richard Tottell, 1574.

SCR — Rushworth, John. "Star Chamber Reports: 1 Charles I." In *Historical Collections of Private Passages of State: Volume 3, 1639-40.* 1-4. London: D Browne, 1721. British History Online. Accessed October 12, 2015, http://www.british-history.ac.uk/rushworth-papers/vol3/pp1-4

SR — The Statutes of the Realm

INTRODUCCIÓN

Antes de principiar, quiero narrar de la historia de este proyecto que si algo prueba es que cuando se escribe la historia del *common law* uno comienza con certeza, pero nunca sabe dónde va a acabar. Esta investigación comenzó su andadura con el proyecto de investigación *Vidas por el Derecho* de la Universidad de Huelva bajo la dirección de profesor Carlos Petit, a la que se sumó más tarde la codirección del profesor Jesús Vallejo. En realidad, la investigación con la que había comenzado mi período doctoral trataba sobre la biografía intelectual del reputado *abuelo* del realismo jurídico americano, el Juez Oliver Wendell Holmes (1841-1935): en concreto sobre la evolución de sus ideas religiosas en relación con su opera magna sobre la historia del *common law*. Con este propósito realicé varías estancias de investigación para recopilar información en la Harvard Law School bajo la supervisión del profesor Daniel Coquillette entre 2007 y 2010. Este proyecto ha quedado apartado, cocinándose a fuego lento, por así decirlo, pero mi propósito es retomarlo en un futuro no demasiado lejano.

En el curso de dicha investigación, gracias a la atención del profesor Sebastián Martín que supo indicarle mi trabajo al profesor Pietro Costa, recibí una propuesta para preparar un artículo para el monográfico de la revista *Quaderni Fiorentini* del 2011 dedicado al derecho de los jueces. Puesto que yo estaba trabajando con Holmes, en un principio mi idea era realizar un trabajo que relacionara las teorías sobre la naturaleza del *common law* del Juez Holmes con la resolución de los conflictos laborales que debido a la incipiente revolución industrial de los EE. UU. a finales del siglo XIX estaban desbordando los tribunales ordinarios. No es cuestión ahora de entrar en la discusión de este problema historiográfico, ni tampoco pormenorizar lo que planeaba para la elaboración del artículo**;** valga sólo decir que, como parte del mismo, me detuve a estudiar ciertas *opinions* que Holmes había emitido como juez de la *Massachusetts Supreme Judicial Court*. En particular, en uno de esos casos, un grupo de sindicalistas habían sido acusados de conspiración por formar piquetes informativos tratando de boicotear el proceso de contratación por parte de un empresario recalcitrante. Al margen de los hechos mencionados, lo importante desde el punto de vista jurídico es que en la discusión de aquellos casos planeaban una serie de cuestiones de fondo: ¿Qué tipo de delito es la conspiración? ¿Se trata de un delito de *common law*? ¿Es un delito positivo? ¿Cuál es la definición del mismo?

El hecho de que se plantearan estos interrogantes en sede judicial implicaba que seguramente existía un debate doctrinal al respecto, contemporáneo al propio caso. Lo cual significaba que no podía salir al paso consultando el sentido actual del delito de conspiración, puesto que era indudable que el mismo es el término *ad quem* de aquel debate doctrinal de finales del siglo XIX. No me quedaba más remedio que consultar la historiografía sobre el delito de conspiración, que, lejos de aclararme el asunto, me llevó a interesarme por las propias fuentes históricas. Más adelante, en el curso de esta tesis, me detendré a explicar las razones por las que la historiografía resulta insuficiente para hacerse una idea del sentido de aquel debate doctrinal que planeaba sobre el caso decidido por el juez Holmes. Lo importante es que la consulta de aquellas fuentes me llevó por la senda de una nueva investigación sobre la historia del delito de conspiración que, para bien o para mal, se ha acabó convirtiendo en mi proyecto doctoral.

Entre otros caminos inesperados esta investigación me llevó a interesarme por un caso citado hasta la extenuación por la historiografía que nadie ha investigado a fondo hasta la fecha: el famoso *Poulterers' Case*. Así, que de la *Victorian America* descendí al mundo extraño de la Inglaterra jacobina. Fue en el curso de una estancia de investigación en el *University College London* en 2012 que conseguí las prolijas deposiciones de este caso, cuya *secretary hand* torturó mi vista de miope por más de un año. Es el arquitrabe de la última parte de esta tesis.

Y fue entonces, con todo en marcha y con la investigación avanzada, cuando la Profesora Marta Lorente me brindó la oportunidad de escribir esta tesis y no otra que hubiera sido muy diferente, al abrirme las puertas de la Universidad Autónoma de Madrid. Aquí he podido completar las fuentes que mi tesis necesitaba para poder ser escrita en la forma en que la presente. Y he encontrado el tiempo y la tranquilidad necesaria para pasar de las acciones a las palabras.

GETTING READY FOR WORK

THE MYSTERY OF CONSPIRACY

I would like to open this dissertation with a couple of long quotes. The first is from James Wallace Bryan, the author that wrote one of the first monographs about the history of the law of conspiracy in 1909:

> There is scarcely a more complex topic in the entire domain of British national jurisprudence than that of illegal combinations. The law relating to them has been more than ordinarily the creature of accident and special conditions. The resultant contradiction and confusion introduced into the cases renders extremely difficult the task of extracting the underlying principles, tracing their rise and growth, and giving an intelligible account of the causes which have determined their subsequent history.[1]

The other was written some 70 years later by one the greatest criminal law scholars of all times:

> There seems to be considerable mystery about the development of conspiracy as a general inchoate offence… two remarkable transformations occurred in the period from the early seventeenth century to the full-blown recognition of conspiracy as an inchoate offence in the mid-nineteenth century. First, the doctrine was abstracted so that it eventually applied to inchoate agreements to commit violent felonies. Secondly, conspiracy was converted from a relatively minor offence into a major felony, punished on a par with the felony comprising the objective of the unlawful agreement. Neither of these remarkable processes of transformation has received much attention in the literature, and this is not the proper framework for the needed historical analysis.[2]

What is so mysterious and elusive about the history of the law of conspiracy? To be sure, as Bryan points out, the growth of the law of conspiracy escapes the rational powers of the modern scholar. But Bryan's frustration springs from his unattainable goal of finding the rise and growth of the underlying principles of the law of conspiracy. The entangled web of precedents claiming to bear upon that law can hardly be reduced to the parameters of doctrinal history and modern case-law analysis. It is not only that there is no way of ascertaining clear *rationes decidendi* or *obita* without incurring in heavy work interpretation, but also that most of what is going on is not in plain sight in the case-law, but rather in the background of the lawyer's mind. Or, to put it in

[1] James Wallace Bryan, *The Development of the English Law of Conspiracy* (Baltimore: Johns Hopkins Press, 1909), 7.

[2] George P. Fletcher, *Rethinking Criminal Law* (Boston; Toronto: Little, Brown and Co., 1978) 221-3.

other words, we cannot disentangle the blackletter of the law from the lawyer who utters it. And Bryan's logical mind would never meet with that lawyer's.

Judging from Fletcher's dictum, Bryan's doctrinal attempt at systematizing the history of conspiracy failed miserably. Fletcher's tone is different however. He is not exasperated with conspiracy's lack of logic, but rather annoyed with the gap in our knowledge of the development of the modern law of conspiracy. This is not stuff a theoretician should waste his time with. But again, any historian that aims at solving the *mystery* of the *transformation* of the law of malicious prosecution into an inchoate offence is bound to fail miserably as well. They[3] would be assuming a default theory about meaning that would preclude anything in the way of explanation of that transformation. What is a mystery is the transformation. We know the *terminus a quo*, malicious prosecution, and the *terminus ad quem*, the inchoate offence. But what happens in between is a black box. And if we start with opaque terms such as *transformation*, historical research would shed very little light on that box. In the absence of a theory about what *transformation* is, historical accounts are as explanatory as saying that an apple is a seed that transformed itself into a tree that transformed itself into the apple.

The problem of conspiracy can only be solved if we abandon any doctrinal approach altogether and focus instead on its intellectual history. After all, it we remove its normative aspect, the history of legal doctrines is but a branch of intellectual history. But that begs the question: what is intellectual history anyway? As with any definitional problem, there is no easy answer. To be sure, intellectual history must deal with how ideas or concepts originate and change through time, but this again begs the question as to what are ideas or concepts and what is originate, and what is change. I take that these are things that do not concern most intellectual historians, who take both concepts and change as facts of life and simply set about themselves to chart the changes and transformations of these ideas through different data points. Indeed, most of the time the process would be described with vague words such as *transformation, change, development, evolution, shift, revolution, growth, transition, switch, rise, fall, decline, emergence, coalesce, crystallize*. But these words explain nothing in themselves; they simply attest some direction of change. The

[3] Henceforward I will use the gender-neutral singular they whenever it is fit.

only thing close to an explanation these scholars would give is relating conceptual change to its historical context. But again, putting ideas in context is no explanation but an interpretation.

If we are to use history to explain conceptual change, we need some theory about what concepts are, what their boundaries and structure are, how they are born, and how they change. Now, it should be recalled that most of what we know about concepts from the past is gathered from written sources. That is, conceptual history after all is nothing but an unprincipled fancy way to make diachronic semantics. Thus, what we need is not a theory about concepts but a theory about how concepts relate to language, and about linguistic change. In this dissertation, I will resort to three such theories, which belong to what is now known with the umbrella term of cognitive linguistics.

There is no single theory of cognitive linguistics. However, most approaches coincide in assuming that language is not different from the rest of our mental life and that consequently the meaning of words is governed and must be explained by the same mental processes that govern other aspects of our minds such as our perception. This implies that semantic theory would be but an aspect of the theory of the mind. It follows that cognitive linguistics strongly opposes the idea that words have meanings independent of use that are somehow stored in our brains, and that we encode and decode meaning by combining these lexical units according to rules stored somewhere else in our brains. It also debunks the idea that we to decide whether to apply a word or not to refer to something, we have to resort to abstract definitions.

Therefore, it should be kept in sight that what I am going to discuss in this section is grounded in theories about how our mind processes, organizes, stores and reuses information by means of cognitive structures, and how, through these structures, it is able to create new novel structures that are not based on previous experience. Specifically, I will sketch here how these cognitive structures become encoded in the language as semantic structures, and how we create and structure our categories leading to the gradation of such semantic structures. I will also summarily discuss how this semantic structure operates to produce local meaning in discourse and thought. Needless to say, this account is far from exhaustive or complete, and my goal here is not to contribute to cognitive linguistics. Rather, my approach is pragmatic. I will take some notions that we can use to give a more definite shape to conceptual history and that would enable us to explain the *transformation* of the law of conspiracy in more definite and less mysterious terms.

These very same notions can also help us to conceptualize the legal mind and legal reasoning in a different way than that to which we are used to in our textbooks.

FRAMES

The term of *frame*, and cognate terms such as *schema*, *script*, *narrative* and *idealized cognitive model* can be generally defined as the "many organized packages of knowledge, beliefs, and patterns of practice that shape and allow humans to make sense of their experiences."[4] Another definition can be "a schematization of experience (a knowledge structure), which is represented at the conceptual level and held in long-term memory."[5] And more specifically with regards to language it can be defined as "a knowledge structure required in order to understand a particular word or related set of words."[6]

One illustration of such a knowledge structure induced from our past experiences is what we might call the schema of a face. Based on all the faces we have seen, a structure has been formed in our minds that is very schematic and abstract: it does not contain all the possible features a face should have, and it does not contain particulars that we might have seen in each different face. For most of us, this structure probably contains an oval shape with a forehead covered by some hair, two eyebrows, two eyes, cheeks, a nose, a mouth, a chin and ears, all arranged in a certain symmetrical way. It would probably not omit information about the wrinkles of the forehead, or the area between the nose and the upper lip where the moustache grows, or the nostrils. It would omit any particular shape we have encountered, or distinctive marks such as moles or scars. For sure, the schematic knowledge that a portrait painter or a laryngologist would have of a face will vary considerably with regard to ours. This schematic knowledge structure or frame allows us to recognize a face when we see one, and not mistake it for a hat. And it is this frame that we encode in words such as *face*, *nose*, or *mouth*, and that we evoke when we use these words.

The schema of a face is but a frame based on our experience of the world. There are other knowledge structures based on our bodily experiences such as the frame of fear or love. But there

---

[4] Charles J. Fillmore, and Collin Baker, "A Frames Approach to Semantic Analysis," in *The Oxford Handbook of Linguistic Analysis*, ed. Bernd Heine and Heiko Narro. (Oxford: Oxford University Press, 2009) 314.

[5] Vyvyan Evans, and Melanie Green, *Cognitive Linguistics. An Introduction* (Edinburgh: Edinburgh University Press, 2006), 222.

[6] Evans and Green, *Cognitive Linguistics*, 225.

are also frames based on our being embedded in a social and cultural setting. The calendric system is one such frame, as are social institutions such as marriage or war, the employment relationship, or the stock market. This is also the case of political systems such as a republic or a monarchy. All these social and cultural experiences also become entrenched in our mind in the form of schematic knowledge or frames that we use to make sense of this social world and the words we use to describe it.[7]

As suggested above, the meaning of words and grammatical constructions cannot be understood except by reference to these frames.[8] Now, this meaning comes in the form of these chunks of related information. In the example above, the frame FACE is made up of the indicated elements that are organized in a certain way. That means that we cannot access that information without at the same time accessing the other information that forms part of the frame. When we think of a mouth, we think of a mouth in a face. It follows that when we use a word to mean something, what we do is *profile* a concept against a larger *background* frame. In using the word *mouth* to evoke the frame FACE, we profile that part of the face against the rest. That is why, if somebody tells us, "he's got a big mouth," we will not picture an isolated mouth but a whole face, focusing on the mouth.

The main consequence of this phenomenon for semantic theory is the so called encyclopedic view of semantics as opposed to the dictionary view. That is, rather than seeing words as coupled to single definitions we should look at them as access points to these frames. Indeed, if we think that these frames are combined in lager frames (the FACE frame belongs to the BODY frame), then words become access points to vast conceptual networks of structured knowledge. It follows that that the kind of knowledge we can get from a dictionary based on isolated word definitions would never suffice to understand the meaning of a given text. "The full meaning of a text is vastly underdetermined by its linguistic form alone."[9]. The meaning of a given text becomes complete when these frames are activated. Indeed, it can be said that interpreting a text is nothing more than setting it against background frames.

[7] Filmore and Baker, *Frames*, 315.

[8] Evans and Green, *Cognitive Linguistics*, 222.

[9] Filmore and Baker, *Frames*, 315.

Let us now apply what I have said so far to a new example from a culturally embedded frame: the frame WASHING TEETH. Based on repeated experience, the main elements of that frame would be:

-The setting is usually a bathroom, whether a private or a public one.

-The time is usually the morning before going out, or the night before going to bed.

-There is an agent doing the main action.

-There is tooth paste.

-There is a toothbrush, usually set in a glass.

-The agent puts the toothpaste on the toothbrush.

-The agent applies the toothbrush against the teeth.

-The agent washes the mouth and rinses the toothbrush, and places the toothbrush back in the glass.

-The agent begins their day if it is set up in the morning, or goes to bed if it is nighttime.

Most of the elements of this frame are linguistically anchored or lexicalized with terms such as *toothbrush, toothpaste, bathroom cabinet,* or expressions like *brush your teeth.*

Let us now see how we can interpret the sentence, "Peter took the toothpaste from the shelf." If we assume a dictionary view of semantics, the meaning of this sentence would be the result of the combination of the words take, toothpaste, shelve, and Peter. As such, it would give us very little information. We would picture Peter taking the toothpaste from a shelf. However, the truth is that most of us would imagine a richer picture and would be able to draw many inferences that do not follow from the mere meaning of the words. The term *toothpaste* would immediately license us to interpret this sentence against the frame of WASHING TEETH. We would profile an agent taking the toothpaste against the rest of the frame. We would most probably picture Peter in a generic bathroom, taking the toothpaste from the bathroom cabinet. We would think that Peter is about to wash his teeth and that therefore he is beginning or ending his day, etc.

Yet, the meaning of the sentence can change altogether if we profile the word *shelf* against the frame SHOPPING AT A SUPERMARKET. We will picture a totally different scene and draw

completely different conclusions. This would be likewise the case if it happens to be that we know Peter and that he works at a toothpaste factory. We would profile the words *shelf* and *toothpaste* against the frame FRIEND PETER and within it, against the subframe WORKING AT A FACTORY.

When given a linguistic input such as the one discussed above, we map a linguistic sign against a frame; we are *evoking* this cognitive frame.[10] It follows that the interpretation of linguistic input consists of this conceptual operation of frame evocation or connecting linguistic signs with these wider frames. Frame semantics is therefore the "study of how linguistic forms evoke or activate frame knowledge, and how the frames thus activated can be integrated into an understanding of the passages that contain these forms."[11] The basic assumption of frame semantics is that "all content words require for their understanding an appeal to the background frames within which the meaning they convey is motivated and interpreted."[12]

PROTOTYPE Theory

This theory was developed by Eleanor Rosh in the 1970s to account for the results of experimental research about how humans form categories. It opposes the view that category membership is defined by a set of "necessary and (jointly) sufficient conditions."[13] The classical example of the problems facing this view is the definition of the category of *bachelor* as an 'unmarried adult male', which would include exemplars that we do not consider part of it like the Pope or a homosexual male.[14] That is, it seems that in our experience, deciding whether an instance does belong to a category does not depend on a well-defined set of conditions but on other factors.

Furthermore, the definitional view of the structure of categories "requires the identification of all those features that are shared by all members of a category (necessary features), and that together are sufficient to define that category (no more features are required)."[15] As Wittgenstein pointed out, words like *game* cannot be reduced to any single set of necessary and sufficient

[10] Ib. 316.

[11] Ib., 317.

[12] Ib., 318.

[13] Evans and Green, *Cognitive Linguistics*, 251.

[14] Ib., 160.

[15] Ib., 252.

features. For one thing, we would include within it such disparate things such as chess, boxing, rugby, bridge, soccer, tennis, hopscotch, ring a ring of roses, soccer, Pac-Man, tic-tac-toe, ball and cup, bloody knuckles, beer die, pennies, darts, truth or dare, loose and fast, pig in a poke, just to mention a few. As it happens to be, we cannot find a set of features that are shared by all the members of the category, and therefore, we cannot come up with a definition that would account for them all.[16]

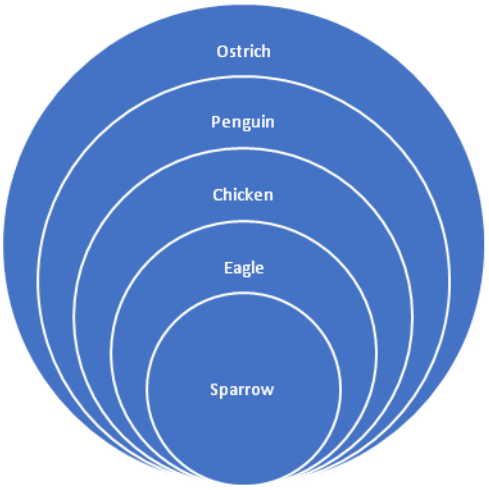
Rosh's research revealed that most human categories present what she called prototype effects. We do not think in abstract terms. Rather, we conceive the categories in terms of what would be a good example of it, that is, a prototypical member of it, and what would be a less prototypical one. If we are to represent this category, the prototype would be at the center of it. Then other members would be at relative distances from this prototype, and some would be at the boundaries of the category. In other words, these categories that show prototype categories are graded categories.[17] It follows from this that, contrary to the definitional view, the boundaries of human categories are fuzzy, and that the membership of some exemplars would be uncertain. These, indeed, would probably fall within more than one category.[18]

The classic illustration of a category presenting prototype effects is that of *bird*. Most people think of a sparrow or a robin as the best representatives of this category. Eagles would be somewhere in the middle. Penguins and ostriches are borderline examples of birds.

[16] Ib., 253.

[17] Ib., 206.

[18] Ib., 253-4.



In conclusion, it can be said that those members that share the greatest number of features with the rest of the members would be the prototypes of a given category. By contrast, the members that share fewer attributes with other members would be the less prototypical members. For that reason, members of a category present family resemblance relations: "while there are no attributes common to all members… there is sufficient similarity between members that they can be said to resemble one another to varying degrees."[19] In the case of the category *game*, what characterizes all these disparate things is that there is a family relationship. While any single item does not share all its features with the rest, it shares some features with some members.

As we will show later, we can use this theory to explain how people perceive the structure of legal categories such as that of homicide. We can conceive of it as a set of necessary and sufficient conditions, or rather as a fuzzy category made of a series of cases, some of which would be more prototypical core and others less prototypical, and thus somewhere in its periphery.

Mappings, Mental Spaces and Blends

After briefly discussing the semantic structure of words and the prototype effects within categories, it remains to be seen how we produce meaning out of these structures. More specifically, we need a model that would explain the dynamic aspects of meaning as it unfolds in thought and discourse. Incidentally, this theory would also provide a means of modelling the

[19] Ib., 265.

processes that lead to semantic diachronic change and help us explain the radial polysemic structure of categories like that of *conspiracy*.

The idea that words are simply access points to frames of structured knowledge necessarily implies that meaning is something we construct rather than passively receive. But how do we construct meaning? The very first thing we should keep in mind is that this is a process that pretty much happens under the radar of our consciences. That things and words have meanings seems such an obvious, automatic, and mundane thing to us that we cannot imagine the complicated mental operations that need to take place before the simplest meaning is produced. The essence of these operations are the mappings between different cognitive domains. *Mapping* is a term borrowed from mathematics, and in its most general sense is used to refer to "a correspondence between two sets that assigns to each element in the first counterpart a counterpart in the second." Thus, cognitive linguistics take the mappings between domains to be "the unique human cognitive faculty of producing, transferring and processing meaning" that explains not only its production in discourse but also human reasoning.[20]

The main mappings are the projection mapping, the pragmatic function mapping, and the schema mapping. A projection mapping involves the partial projection of part of the structure of one domain onto another. The structuring domain is the source domain, and the structured domain is the target. This kind of mapping is frequently called up to think and talk about abstract domains in terms of less abstract ones by partially transferring structure and lexicon. This is the case of the so-called conceptual metaphors like the mapping TIME AS SPACE. The presence of this mental operation is attested by expression like: I will be there *over* the weekend, as the date is *coming*, when the day is *over*, I should *move* the meeting *up*, it happened *somewhere in* the past, the future is *before* him.[21] Another well-known conceptual metaphor is ARGUMENT AS WAR expressed in sentences like: your claims are *indefensible*, he *attacked every weak point* in my argument, his criticisms were *right on target*, I *demolished* his argument, I've never *won* an argument with him.[22]

[20] Gilles Faucconier. *Mappings in Thought and Language* (Cambridge : Cambridge University Press, 1997), 1.

[21] Ib., 11.

[22] Lakoff, George, and Mark Johnson, "Conceptual Metaphor in Everyday Language," *The Journal of Philosophy* 77 (1980): 454.

The pragmatic function mapping "typically corresponds to two categories of objects, which are mapped onto each other by a pragmatic function." Synecdoche and metonymy are very important pragmatic functions that allow us to identify an entity in terms of its counterpart in the projection. For instance, such pragmatic function mapping takes place in a sentence like "The White House made the announcement about its new policy on Russia." This way, the president of the U. S. is identified by the place where he lives and works in the projection.[23]

The third kind of mapping is the schema mapping. This is drawn when we evoke a frame to structure a given situation, and it is usually called up by the use of language. The typical case is the structuring of a mental space by frames. For instance, the sentence "Jack buys gold from Jill" prompts a mental space with the elements Jack, gold, and Jill. This in turn is mapped onto the frame of COMMERCIAL EXCHANGE made of the slots buyer, seller, and merchandise.[24]

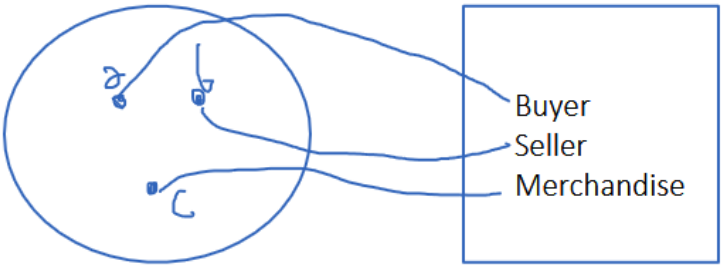
I have already introduced a new term, *mental space*. A mental space is "a partial structure that proliferates when we think and talk, allowing fine-grained partitioning of our discourse and knowledge structures." They are built and linked by these mappings.[25] As mentioned above, mental spaces can be connected to long-term frames which structure them, but they can be activated in many ways, and change dynamically as thought or discourse progresses.[26] Normally, mental spaces are represented by circles within which there are points indicating elements or structure, and lines drawing connections between spaces. This diagram shows the mental operation prompted by this abovementioned linguistic input:

[23] Fauconnier, *Mappings*, 11.

[24] Ib., 11-12.

[25] Ib., 11.

[26] Gilles Fauconnier, and Mark Turner. *The Way we Think. Conceptual Blending and the Mind's Complexity* (New York: Basic Books, 2002), 40.



So far, we have described the different elements necessary to create a model that would account for the production of meaning. Having said that, there is nothing in this model that would go beyond the knowledge structures that we already have from repeated experience. We have the tools to describe and explain the construction of meaning out of the meanings we already have, but nothing in our model licenses us to produce new meaning. We need a theory that would also attest for human creativity and imagination, for the creation of new meaning.

Fauconnier and Turners have developed a quite popular theory in cognitive linguistics to explain the creative aspects of the language like the assemblage of new metaphors and the elaboration of counterfactuals. The key to that theory is the idea of conceptual blending, which according to them is a unique human capability that not only relates to imagination and creativity but also to many other areas of human activity. They came up with this model of conceptual blending to explain certain cases in which the linguistic input does not suffice to warrant the meaning construction. Simply put, the meaning of a certain expression cannot be modelled by simply resorting to frame evocation, nor as instances of conceptual metaphors as described above, but all indicates that some other operation generating an unanticipated meaning is present.[27]

The best know example of this is the expression "That surgeon is a butcher." (I will closely follow the description of.[28] At first sight this seems to be a case of conceptual metaphor in which a target domain SURGEON is being understood in terms of the source domain BUTCHER. The different elements of this projection mapping are represented in this table:

Source: Butcher	Mapping	Target: Surgeon

[27] Evans and Green, *Cognitive Linguistics*, 400-1.

[28] Ib., 401-5.

Butcher	→	Surgeon
Cleaver	→	Scalpel
Animal Carcasses	→	Human Patients
Dismembering	→	Operating

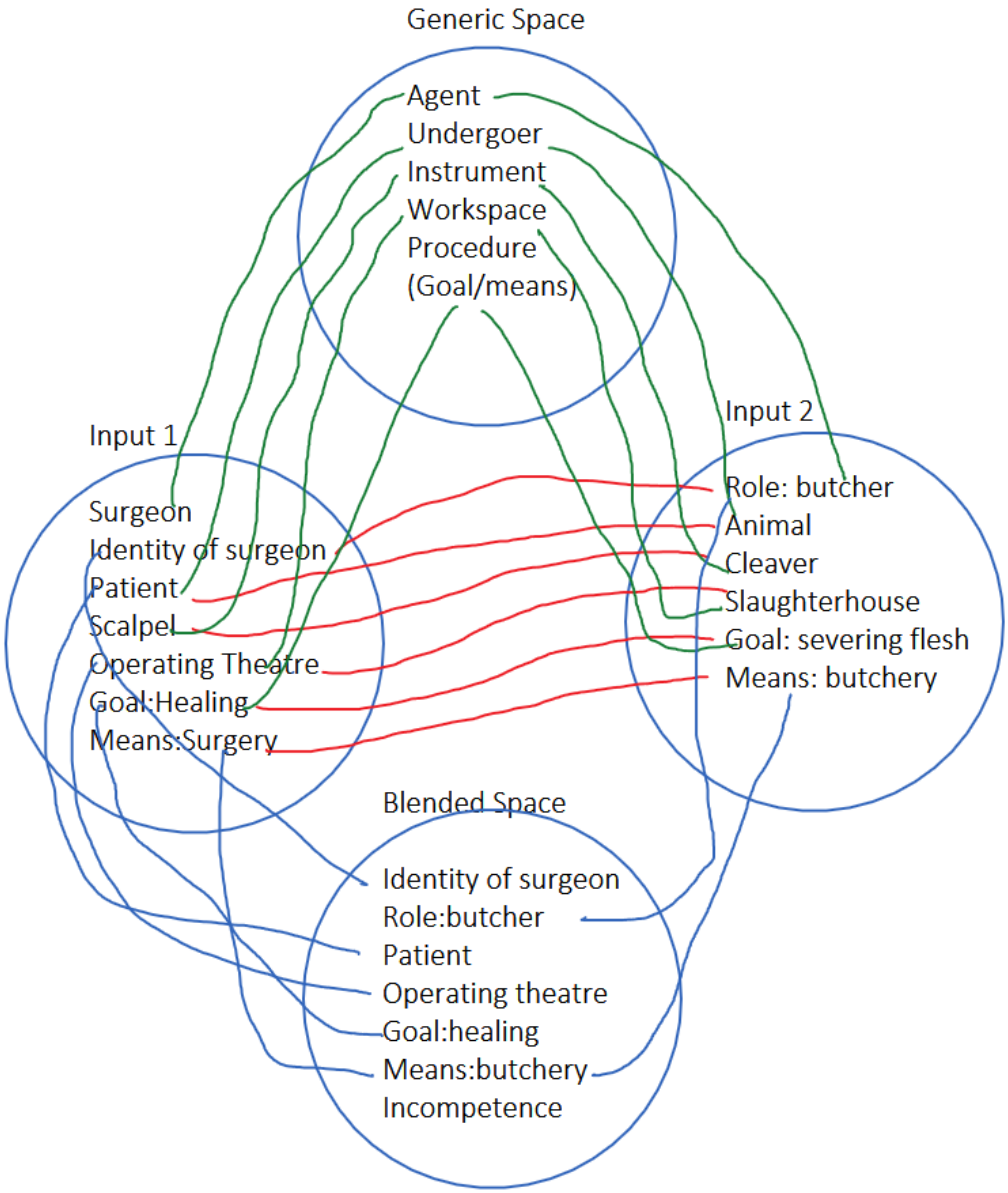
On closer inspection, we realize that this model cannot account for the meaning of the expression. We know that the intent of the sentence is to pass negative judgment of the surgeon, implying that they are incompetent. However, if we think of this as a case of conceptual metaphor, the negative judgment cannot be transferred to the target domain as it does not belong to the source domain. Actually, the frame of a butcher would include an appreciation of this vocation as one requiring training and skill. It follows that when we conceive a surgeon as a butcher, a new meaning emerges that is different from the frames structuring these mental spaces. Therefore, there must be an emerging structure or meaning out of these existing frames that would explain our understanding of this sentence.

The theory of conceptual blending or conceptual integration deals with this emerging meaning that is more than the sum of its parts. To begin with, in contrast to the model of projection maps, in order to account for the emergent structure, we are going to need a multi-space model of meaning construction and an integration network. So, in the example of "That surgeon is a butcher," the model will include two input spaces connected by a generic space. This generic space contains abstract information that is common to both input spaces and warranting the mappings between the elements of both. This abstract information illuminates the shared structure of both mental spaces. To these, we should add a blended space that contains the emergent structure. This emergent structure arises out of the combination of elements from both input spaces, but its meaning cannot be totally derived from them. It also includes meaning that is not in either of them.

With this model, we can now give an account of the meaning of the sentence. In the new emergent structure or blend, elements of both input spaces are combined. There is a surgeon, a patient, and an operating theater. Yet other elements from the input spaces are not transferred to the blend. For instance, the slaughterhouse, or the cleaver, or the animal carcasses are not transferred to the blend. And most importantly, the skills of a surgeon are not projected either, but rather those of a butcher. Thus, in the new space there is a surgeon in an operating theater but with

the skills of a butcher. This is the new meaning which is a combination of elements of both input spaces but that is not a projection from any of those input spaces. Neither of the frames structuring the butcher or the surgeon spaces contain a butcher surgeon. And because the emergent structure is partially organized by the structure projected from the surgery input, we then draw the conclusion that this surgeon with the skills of a butcher cannot be but an incompetent one.

Summing up, the simplest blends emerge in these networks of mental spaces composed of two input spaces, a generic space, and the blend. But integration networks with several input spaces are possible. Between these two input spaces there are going to be matchings or counterpart connections. The generic space will contain abstract structure induced from the two input spaces. The blend can contain structure projected from the generic space and the input spaces, but also structure that is not present in the inputs. The projection of elements from the inputs onto the blend is selective. The emergent structure that appears in the blend but is not present in the inputs arises by three different processes. By composition of the elements of the input spaces, by pattern completion or recruiting of familiar frames, and by elaboration of the blend or running the blend (i.e. imagining the new scenario created by composition and completion).



As suggested earlier, conceptual blends do not only account for linguistic creativity. This theory is meant to be a universal explanation of the way we think and it explains a wide variety of manifestations of human ingenuity. I will show how intellectual and cultural history could be used to show how pervasive this phenomenon of conceptual blending is, and how historical research could be enriched with a theory that gives us the tools to express the birth of new ideas and conceptual change in a more articulated way.

There are certain times in human history when two different cultures come together for one reason or another. It is safe to say that when that happens, a vast process of conceptual blending would ensue among the members of both cultures. Indeed, the most spectacular blends would probably be produced as a result of such an encounter. At least this was the outcome of the conversion of the barbaric tribes to Christianity during the Late Antiquity and Early Middle Ages. Blends between elements of both cultures can be seen everywhere in the historical and archaeological record. For instance, in rendering the Gospel understandable to the Saxons—recently and brutally converted by the Carolingians, the old Saxon poem of *Heliand* or 'savior'[29] (circa 830) draws from two input spaces: from the traditional Germanic epic poems that reflect the warrior ethos and the social structure of that people, and from the Gospel story[30] (which in turn can be thought of as a blend between Jewish religious beliefs and practices and Hellenistic thought). In the poem, we can see how elements from these input spaces are combined in a new unique emerging structure that does not correspond to either of them.

In the blended space of the *Heliand*, Jesus is the *landes uuard* or 'guardian of the land' and the *thiodo drothin* or 'lord of the peoples.' The Virgin Mary is presented as an *adalcnosles uuif* or 'woman of noble lineage.' King Herod is a *boggebo* or 'giver of rings.' The apostles are *gisidos* or 'companions, retainers' of Christ, and Peter is his *suerthegan* or his 'sword-theng.' The desert where Jesus was tempted is a forest. The ship where the disciples sail the sea of Galilee is a *hoh hurnidskip* or 'high-horned ship' used in the northern waters. The infant Christ is clothed with jewels and the shepherds are grooms looking after horses. The marriage at Cana becomes a typical Germanic Lord feast. Jesus enters Jerusalem as a lord on foot rather than on an undignified donkey. Likewise, as a Saxon lord who would seek young sword-wise warriors as retainers gathers about him 'youths for disciples, young men and good sword-wise warriors.' Mathew is a *cuninges thegn* that is a 'king's thegn and a *drohtines man* or 'the Lord's retainer' who finds in Jesus 'a more generous mead-giver than he had ever had before as a liege lord in this world.' (267) The disciples' 'Lord, teach us to pray' becomes *gerihti us that geruni* or 'reveal us the runes.'[31]

[29] Henceforward, I will use single quotation marks to refer to concepts.

[30] Richard A. Fletcher, *The Barbarian Conversion: From Paganism to Christianity* (Berkley; Los Angeles: California University Press, 1999), 266.

[31] Ib., 265-7.

Perhaps even more astonishing is the Franks Casket. This is a small box named this way after one of its nineteenth century owners, Augustus Frank, and is made of whale's bone, probably dating from the early-eighth century Northumbrian Renaissance. The remarkable thing about this artifact is the way it is decorated. On its sides, several scenes are carved. On the left side, there is a representation of the Roman foundational myth with Romulus and Remus being nourished by a She-wolf. The rear panel contains the destruction of Jerusalem by Titus. On the lid, these depictions are already suggestive of multiple blendings in operation, but let us focus on the front panel where this phenomenon is more visible. This panel is divided into two juxtaposed scenes. On the left-hand side, there is a depiction of the Germanic myth of Weland the Smith. As the story goes, Weland was abducted by the King Nithad who lamed and forced him to craft magnificent art. When the occasion presented itself, Weland planned his revenge and escape. Thus, before escaping, he murdered the king's sons. He turned their skulls into goblets and used them to serve drink to the father, and their eyeballs into dazzling gems which he gave to the mother as a present. And finally, he raped and impregnated the king's daughter.[32]

On the right-hand side of the front panel, we find the three magi bringing gifts for the newborn Christ child. Is there any explanation for this most startling juxtaposition or is it just a random assortment of scenes taken from here and there? It can be argued that in this front panel we have maybe one of those rare occasions in which two input spaces of an integration network appear in the flesh in a physical object and not just as a representation of mental processes. The Weland's input space is structured by a certain narrative of the Germanic values, whereas the Adoration of the Magi's input space is structured by the narrative of the Christian values. There would be a generic space signaling commonalities between the two narratives. But what does it mean? It is clear that the meaning of this juxtaposition does not arise from any of these input spaces, but that it is an emergent structure arising from a blend of both spaces. Thus, it has been suggested that the front panel represents the ideals of good and bad lordship of the warrior ethos. Christ is the good lord to whom you bring gifts as a sign of loyalty. Nithad is the bad lord who abuses his followers and for that they should get back at him.[33] Thus, we have that in the generic space there is the aspects *lord, demeanor of a lord, reaction to the demeanor of a lord*. And it is

[32] Ib., 268-70.

[33] Richard Abels, "What has Weland to Do with Christ? The Franks Casket and the Acculturation of Christianity in Early Anglo-Saxon England," *Speculum* 84 (2009): 549-581.

only in the blended space where the new meaning can arise. Without it, we cannot take Christ as a good lord, as the space of the Gospel does not include this possibility. Nor in the space of the Germanic myth is there any Lord named Christ and son of God. To account for the meaning of the juxtaposition of the two panels, we need this emerging structure.

These are dramatic cases of conceptual blends. As has been brought home several times in this chapter, the theory of conceptual blend accounts for the production of new meaning in on-line processes like thought and discourse. This means that these blends are mainly ephemeral and for local purposes. There is the possibility that these blends become culturally entrenched and fixed. It is clear that the blend between the warrior ethos and the Christian Gospel arose out of contingent demands as the converted Germanic peoples found it hard to reconcile the culture of forgiveness with their own. The blended version was more palatable. In the end, however, this vengeful Christianity did not survive the period of conversion and these are vestiges of local blends that died out with the thought that succored them. But, as suggested above, the very Gospel is an instance of a blend that not only survives but that becomes the center of a new culture.

Therefore, the theory of the conceptual blending that explains how new ideas are created out of old ones can be supplemented with diachronic semantics, or with history for that matter, that would describe how these blends that are constantly born, and constantly die out, sometimes become frames themselves, capable of structuring our thought and discourse.

The Law of Conspiracy

To go back to the law of conspiracy, there is no doubt that we can exact great benefit from these conceptions of frame, prototype effects, and blending for the purposes of legal history. For one thing, the way common lawyers are said to think, by analogy, is itself a form of projection mapping that lends itself to modelling as integration network. The common law itself can be seen as the result of this relentless process of generation of emergent spaces every time a case is argued by drawing analogies not only with other cases, but also with different branches of the law, with different legal traditions, or even with other domains alien to legal analysis such as theology, ethics, or political thought. Some of these mappings between rules would be ephemeral and lead to no change of the law, but other blends would become legal categories that would help framing legal reasoning.

We can attest the existence of these blends in multiple ways. The most direct way is by the presence of the lexicon belonging to a certain branch of the law within another area of the law. This indicates that there might be a blending operating between the two. Other times we have to adopt an onomasiological perspective and look at the invocation of concepts or rules belonging to a domain different to that of the discourse where it occurs. Sometimes the blending is motivated by terms capable of invoking several different frames and prompting the phenomenon of frameshifting. We will see all of these operating within the law of conspiracy.

What follows is an attempt, as experimental as it can be, to account for the conceptual history of the law of conspiracy in light of these notions of frame, prototype effects and blends. This is what I mean by the expression *conceptual genealogy* in the title. I realize that both terms have a certain pedigree within the domain of conceptual history and that because of that may lead to a certain misunderstanding. As I see it, *conceptual* and *genealogy* are frequently used in the same sense as *transformation* and *mystery*. It is in the way that historians shrug explanations off. In this dissertation, by using that expression I indicate that I want to describe the semantic structure of the term *conspiracy* within the legal domain as a result of a diachronic process of conceptual mapping (by analogy, framing or metonymy) and blending. Or, to put it in more general words, I want to explain in these terms how the common law tradition has developed over time. In this sense, I hope now that these vague terms such as *development*, acquire a more precise and definite meaning.

Before I sketch out the plan of the thesis, I should say a word about the periodization of this conceptual genealogy. I will focus on the period from the inception of the law of conspiracy in the reign of Edward I to the birth of the modern law of conspiracy in the Early Modern Period. As for the *terminus ad quo*, there is nothing to say since this is where the historiography starts. The *terminus ad quem* may seem arbitrary. Indeed, if we are to make a history of the law of *modern* conspiracy, nothing short of the late nineteenth century would be inaccurate and incomplete. And this was my original purpose. Needless to say, this is not feasible, nor can it be encapsulated in a single dissertation. Not at least if *conceptual genealogy* is to be made. Therefore, I have opted for stopping at the point where traditionally the historiography of conspiracy first detects that the law of conspiracy was undergoing a huge transformation: William Hawkins's rendition of it. However, I should say that the one attempted here is not the most traditional route to the law of modern conspiracy. As we will see in short, the historiography has always started from the nineteenth-century problem of the trade unions and worked its way backwards to the fountains of modern common law conspiracy. At most, some attempts have been made to describe the medieval conspiracy, but rarely without a view to connect it with modern conspiracy. This thesis, instead, will try to enlighten the *mystery* process by which the medieval law *transformed* into the modern one, without retrospective projections of any kind. Furthermore, ending with Hawkins implies including the two leading cases that laid the conceptual foundations of subsequent eighteenth- and nineteenth-century case-law: *The Poulterers' Case* (1611) and *Starling Case* (1665).

In the first chapter of this thesis, I will give an account of the key issues and the frame within which the historiography of conspiracy has been written. Next, I will tackle the problem of the inception of the law of conspiracy and inquire into the reasons why the concepts embraced within that expression were indeed lexicalized as *conspiracy*. The third chapter will lay the foundations of issues that will be later discussed in the fifth chapter. It deals with the doctrine that the will must be taken for the deed and how its meaning is localized within the law of homicide and the law of treason. The fourth chapter describes the process of blending that would lead to the emergence of a new action of conspiracy different from the medieval one, and the ramifications of this change for the domain of the law of conspiracy. Finally, the last chapter draws from the two previous tributaries to show what analogies and blends were drawn in the *Poulterers' Case* and *Starling Case*, resulting in the rearrangement of the law of conspiracy.

1. The Historiography of the Law of Conspiracy

The historiography of the law of conspiracy was inaugurated on the occasion of the mid-Victorian trade unions issue and the movement for the codification of the criminal law of England that the Indian Penal Code had set into motion. Other than from Early Modern sources, most of what we know about the medieval conspiracy was first cobbled together by authors who saw in the labor issue an opportunity to gain allies and advance the codification of criminal law. Theirs was to be an exercise in the doctrinal or internal history of the law of conspiracy with a view to provide a rational basis for the codification of criminal law. History was the handmaid of codification, to paraphrase Maitland. It was inevitable that they would bring their codifying ideals and ideas to bear on their historical inquiry as well as the concerns of organized labor. Thus, in using the historical method, they ran the risk of putting the cart before the horse, beginning first with the concept of conspiracy they needed, and only later working out its historical development as they saw fit. Furthermore, their history was to be consequential, as they laid the ground for the development of a historiographical tradition that revisited and cultivated the issues that they raised at that time.

1.1 The Codification of Conspiracy

1.1.1 The Trade Unions Issue

The much-debated question of the status of trade unions and their practices in nineteenth century-Britain reached its climax by 1871. After the age of the Combination Acts in which Trade Unions and their practices were banned altogether under penalties that ranged from a few months to a year of imprisonment, the Tory settlement of 1825 laid the framework for the next decades in which trade unions, strikes and boycotts were decriminalized within certain boundaries. The law was vague and open to interpretation, particularly as to the extent to which the common law of conspiracy applied to trade unions. This invited different and contrasting views that ranged from the view that the Act to Repeal the Laws Relating to the Combination of Workmen 1825 (6 Geo 4 c 129) had negatively created a right to unionize and strike, to those who thought that trade unions and their practices remained essentially illegal with some exceptions carved out by that law. By the 1850s, it was becoming clear that the courts would tighten those exceptions to limit the ability of the trade unions to strike. This involved not only the interpretation of the penal clauses of the Act of 1825, but also the construction of the common law of conspiracy.

This Tory settlement came to an end with the disenfranchisement of part of the working classes and the arrival of a new Liberal government in 1868 that was eager to deliver to this constituency by trying to fix the labor issue. As a result, two laws were passed which replaced the Act of 1825: the Trade Union Act 1871 (34 & 35 Vict c 31),[34] and the Criminal Law Amendment Act 1871 (34 & 35 Vict c 32). Though the common law of conspiracy was not abrogated, the second provision of the Trade Union Act carved out a wide immunity for the members of trade unions: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."[35] This was complemented with the penal clause of the Criminal Law Amendment Act which in the most convoluted way possible allowed for the application of the common law conspiracy to acts unlawful under this law:

> Nothing in this section shall prevent any person from being liable under any other Act, or otherwise, to any other or higher punishment than is provided for any offence by this section, so that no person be punished twice for the same offence. Provided that no person shall be liable to any punishment for doing or conspiring to do any act on the ground that such act restrains or tends to restrain the free course of trade, unless such act is one of the acts herein-before specified in this section, and is done with the object of coercing as herein-before mentioned.

The new law was tested almost immediately. In December 1872, the gas stokers of London decided to go on a strike demanding that workers who had been victimized by the gas industry for their involvement in a recent successful campaign to raise their wages and end Sunday work were reinstated. As their demands were not met, they walked out putting London under the risk of total darkness. The companies managed to keep a limited supply of gas lighting by bringing in unskilled workers, and though the strike fizzled out, they showed no mercy.[36] Prosecutions were brought against the leaders of the strike for "conspiring to interfere with the free will of the gas company

[34] Henceforward, I will use the Oxford University Standard for the Citation of Legal Authorities (OSCOLA for short). When I cite books of authority, I will use the traditional formula volume, abbreviation, pages.

[35] Trade Union Act, s 2. See also John V. Orth, *Combination and Conspiracy. A Legal History of Trade Unionism* (New York: Oxford University Press, 1991), 135-138. I will use the Chicago Style Citation for non-legal authorities.

[36] Mark Curthoys, *Government, Labour, and the Law in Mid-Victorian Britain* (New York: Oxford University Press, 2004), 166-170.

in the management of its business by the use of improper threats and molestation," and for "conspiring to commit an offence under the Master and Servant Act by breaking their contracts."[37]

The defense counsel warned that should the strikers be convicted on the first count virtually "any combination to induce an employer to do something he might not otherwise want to do could constitute a criminal conspiracy." Brett J[38] dismissed this contention and instructed the jury that "if there was an agreement among the defendant by improper molestation to control the will of the employers, then I tell you that would be an illegal conspiracy at common law, and that such an offence is not abrogated by the Criminal Law Amendment Act". The gas stokers were convicted on the first count. Though the maximum sentence provided for such offence under the Master and Servant Act 1867 (30 & 31 Vict c 141) was of three months, Brett applied the common law of conspiracy extending it to twelve months of imprisonment because of their "disregard of public safety."[39]

Though the government remitted eight months the sentences—keeping the principle that the punishment of a conspiracy to commit a statutory offence might be more severe than the offence's one—this did not stop criticism of the sentence to mount up in the press as an example of judicial activism and class bias. As Brett's principle was ready to be used by the courts in subsequent cases if they saw it fit, risking turning the new legislation on the law of strike into a dead letter, the Home Office thought it convenient to query government law officers whether the law should be amended to avoid the application of the common law of conspiracy, and whether it should be "retained, amended or abolished."[40]

The case also ignited a public debate as to the application of the common law conspiracy to conducts that were lawful when done individually, as well as to whether punishment should be harsher when unlawful conducts were committed individually. James Fitzjames Stephen and Robert Samuel Wright, two Benthamites who would become champions of the codification of the criminal law of England, seized the opportunity to bring the newly enfranchised labor to the cause

[37] Ibidem, 171-172.

[38] Again, I follow the OSCOLA recommendation for referring to a judge in a case by using the capital letter 'J' without period.

[39] Curthoys, *Government*, 172.

[40] Ib., 176-177.

of the codification of criminal law by framing the labor issue as one that could be cured by bringing certainty and affirming the principle of legality in criminal law. In 1870, Wright had been asked to draft a criminal code for Jamaica by the Colonial Office, which he concluded in 1874. Stephen was responsible for the revision of the draft, and it is possible that the decision to draft his own penal code was formed while working on this revision.[41] The attitudes of both men towards organized labor seemed to differ nevertheless. Since 1872, Wright drafted legislation on behalf of the Trade Unions Congress, a version of the act that would replace the Criminal Law Amendment Act which was later abandoned, and some of the crucial provisions of the Conspiracy and Protection of Property Act of 1875. It was said in a meeting of the Trade Unions Congress that "there was no man in England to whom they were more indebted for the improved labour laws under which they lived."[42] Stephen, by contrast, who would rally the working classes behind his project of codification in a meeting of the Trade Unions Congress, had them stalling and hurtling his draft criminal code when they realized that "it did not repeal the law of conspiracy… [nor] secure the right of public meeting."[43] We will see more about this later.

However, it is difficult to say, from their technical writings, whether Stephen had made a tactic alliance with, and whether Wright was a friend of, labor. Reading what they wrote regarding the common law of conspiracy, one gets the impression that they were as concerned with the right of workers to organize and strike, as with not alienating the judiciary, or the conservative forces in Parliament. Stephen, for instance, would initially denounce Brett's rule as an instance of how judges took advantage of the obscurity and vagueness of the common law to punish whatever conducts they disapproved of without giving the workers the chance to know whether they were committing any offence. He further added that this creative sentence took the attention away from the true offence, which was the breaking of contracts in situations that might affect the public safety.[44] Later though, he would admit that Brett was onto something when he laid down his

[41] M. L. Friedland, "R. S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law," *Oxford Journal of Legal Studies* 1 (1981): 308-316.

[42] Ib., 322 n (125).

[43] Ib., 322-4.

[44] Curthoys, *Government*, 177-178.

doctrine, but that it was perhaps not worth keeping it if it meant taking away the right to organize from labor.[45]

1.1.2 Codification Ideas and Ideals

For Stephen, the codification of the criminal law of England was "the reduction of the existing law to an orderly written system, freed from needless technicalities, obscurities, and other defects… the process must be gradual… particular branches of the law [must] be dealt with separately, but each separate measure intended to codify any particular branch must of necessity be more or less incomplete."[46] The first thing we should note here is that the codification of the criminal law is not conceived as the creation of a new body of law out of rational or scientific universal principles, but rather as putting into writing an existing body of unwritten law (that may nevertheless express such universal principles). Codification thus involved not only translating the common law into a statutory language, removing obscurity, ambiguity, and unnecessary complexity, but also arranging it is a rational way, systematizing it. This fell short of reform, but definitely it comprised two levels of intervention on the common law rules. One implying the conceptualization of those rules, and another their grouping together into greater categories and areas of the criminal law. Ultimately, the final goal was the codification of the entire common law to which the codification of the criminal law was only partial. That also meant that Stephen was aware that there would be interactions between the codified criminal law and the uncodified common law.

Stephen's view of the criminal common law was that that "there is probably no department which is so nearly complete in itself as the criminal law,"[47] a law "extremely detailed and explicit [which]… leaves hardly any discretion to the judges."[48] The "extreme completeness and minuteness of the English criminal law" was so because it was "put together slowly and bit by bit by parliament on the one hand and the judges of the superior courts on the other." It followed that "a code which was not founded upon and did not recognize these characteristics of the law of

[45] James Fitzjames Stephen, "The Law of Conspiracy," *Pall Mall Gazzette,* April 17, 1873, 5.

[46] 3 HCLE 350. Cf. p. 347 "Its reduction to an explicit systematic shape, and the removal of the technicalities by which it is disfigured." See also p. 300. Henceforward I will indicate my additions with square brackets, and the editor's with curly brackets.

[47] Ib., 350.

[48] Ib., 353

England would give up one of its most valuable characteristics… and it would necessitate the re-opening and fresh decision of a great number of points which existing decisions have settled."[49]

Thus, Stephen not only views the criminal common law as a body of law, but as one which is complete and therefore autonomous. In other words, he presents the criminal common law as a sort of code of unwritten law in need of articulate expression in a formal code, one that would preserve this "precise and explicit character… by giving the result of an immense amount of experience in the shape of definite rules."[50] This experience is the second important characteristic of this complete body of law: it is the result of history. But what history? In this approach, history itself is the codifying force. It had composed this complete and comprehensive set of rules that is there ready to be put in definite form. Indeed, this body of law is complete because of its own protracted historical development that allowed "the most powerful legislature and the most authoritative body of judges known to history" to slowly but surely fill in every single possible gap. This view of history as constructing a complete code of criminal law piece by piece would shape Stephen's approach to the study of the history of the common law, which would become a preliminary and necessary stage in the process of codification. One can foresee that under such premises parliamentary debate about the penal code would not be one about the substance of the criminal law, but about its form. The substance is a matter only for scholars to determine through historical inquiry. We will see later see the consequences of this premise for the historiography of conspiracy.

This codifying view of history, and this conception of the common law as a complete body of law, was in striking contrast with the more traditional declaratory and principle-based approach that a judge like William Erle could express. The following long passage is worth reproducing to illustrate this view and to bring out the contrast with Stephen's:

> there are some relations between man and man which do not change… and the rules of law relating thereto do not change. There are other relations which are perpetually changing as society progresses, and conflicts of rights caused by this perpetual process of change is the subject of a perpetual process of adjustment, according to the *principles* contained in the common law…Every rule of the common ought to be applied with some limitation of reasonableness in degree… the relations of man upon man… cannot be defined till the laws of matter, and also the laws of mind are within the limits of certain knowledge, and till

[49] Ib., 355.

[50] Ib., 353.

> social progress is stopped. *Definite rules may not be expected*… a perpetual process of adjustment… is effected by the principles of the Common Law… these principles originate practically from the people… [they] may be acted on long before a complete language is framed… The principles are applied at first in the *concrete*; gradually they grow into *rules of wider application*; and the judiciary men and the legislative men adopt them… If the origin of the principles of the common law is to be traced beyond their practical existence, they seem to originate from *conscience*… the words of [jurists]… would not have been handed down if they had merely expressed their intuitions before their highest faculties had been trained by long and painful efforts both to understand the relations of man to man, and the *words of wide extension* expressive of those relations, and also to know how far those relations had been so adjusted by the men who had gone before as that their *adjustment* had been adopted *into the usages of the people and grown into law*; such adoption being the process by which living law grows."[51]

Compared to Stephen's *legislative* prose, this very passage is illustrative of Erle's *judicial* prose: vague, bloated, wordy, unnecessarily solemn. But it is also an example of the ideas the judiciary may entertain as to the nature of the common law and its history. First, the common law is not a complete and comprehensive body of rules but it includes a collection of principles *of wide expression* and *of wide application* which are to be applied to the ever-changing circumstances. Though these principles seem to originate in conscience, they are to be apprehended by expert study of the customs of the people and the growth of the law into which they have found expression as they have been applied to these ever-changing conditions of society. In other words, these principles are to be found by a process of induction. Thus, Erle's method of dealing with the case law goes in the opposite direction: from the specific and concrete to general principles. Indeed, within this view the case law was nothing more than evidence of these principles. The alleged purpose of the legal scholar and the judge would not be to ascertain and map the common law with detail and precision but to reduce it to general operational principles which are to be flexibly applied to changing circumstances.

This view necessarily entails that the judge is going to play a central role as the agency that bridges the gap between the wide principle and the present case by deducing and declaring the rule that applies to it. Stephen did not share this declaratory view of the common law and the judiciary, and he rather considered that when acting in this capacity, judges were truly legislating. Consequently, the case law being law rather than evidence of the law, "when a judge is called on

[51] William Erle, *The Law relating to Trade Unions* (London: Macmillan and Co., 1869), 47-52. Hereafter emphasis mine.

to deal with a new combination of circumstances… he is bound to decide in accordance with principles already established, which can neither disregard nor alter, whether they are to no previous decisions or in books of recognised authority."[52]

For Stephen, the power of the judges to create new law was exercised through "the undisputed power of interpreting written and declaring unwritten law, in a manner generally recognized as of conclusive authority."[53] That is through the judicial interpretation of statutory law, the filling in of the gaps in the law, and the declaration of the common law. With regard to the latter, he contended that:

> Though the existence of this power as inherent in the judges has been asserted by several high authorities for a great length of time, it is hardly probable that any attempt would be made to exercise it at the present day; and any such attempt would be received with great opposition, and would place the bench in an invidious position. The last occasion on which such a course was taken was the treatment of conspiracies in restraint of trade as a common law misdemeanour. I have given the history of this matter, and it is by no means favourable to the declaration by the bench of new offences.[54]

In this passage, Stephen displays his attitude towards judicial lawmaking through the power to declare the common law. Indeed, the very same law of conspiracy as declared by the courts in the cases leading to that of the gas stokers, was an example on how this power could be abused, and how legislating *ex nihilo* could be contested as an interference with the legislative power. In general, regarding the critical matter of the criminal law, Stephen thought that the age of judge-made law had come to an end for good, and that the judiciary should no longer intermeddle with the legislative power:

> In times when legislation was scanty, the powers referred to were necessary. That the law in its earlier stages should be developed by judicial decisions from a few vague generalities was natural and inevitable. But a new state of things has come into existence. On the one hand, the courts have done their work; they have developed the law. On the other hand, parliament is regular in its sittings and active in its labours; and if the protection of society requires the enactment of additional penal laws, parliament will soon supply them. If parliament is not disposed to provide punishments for acts which are upon any ground objectionable or dangerous, the presumption is that they belong to that class of misconduct which it is not desirable to punish. Besides, there is every reason to believe that the criminal law is, and for a considerable time has been, sufficiently developed to provide all the

[52] 3 HCLE 352.

[53] Ib., 355.

[54] Ib., 359.

> protection for the public peace and for the property and persons of individuals which they are likely to require under almost any circumstances which can be imagined; and this is an additional reason why its further development ought to be left in the hands of parliament.[55]

Summing up, we have seen how Stephen argued that the criminal law of England "has been brought into its present condition by a long series of judicial decisions and statements by text-writers… though the form in which it is expressed is to the last degree cumbrous and inconvenient," and how its codification consisted in translating this complete body of law into statutory language and into rational structure without touching its substance. We have also seen how he desired that the code would not be contested or nullified by judicial lawmaking. With this aim in mind, it remains to be seen how and to what extent the codification of the criminal law was to be carried over.

First of all, Stephen considered that there was only a portion of the common law that had to be reduced to written law, namely excuse and justification, some parts of procedure, and "the definitions of murder, manslaughter, assault, theft, forgery, perjury, libel, unlawful assembly, riot, and some other offences of less frequent occurrence and importance."[56] One immediately misses the definition of conspiracy in that list, but this is a matter I will deal with later. Secondly, given the "great richness of the law of England in principles and rules, embodied in judicial decisions, [this] no doubt involves the consequence that a code adequately representing it must be elaborate and detailed." We should recall that we have just seen how Stephen argued that this comprehensiveness of the criminal law, combined with the doctrine of *stare decisis*, made the English judge particularly unfree. However, and thirdly, the code would preserve whatever power the common law gives to the judiciary in the form of general clauses because "such a code would not (except perhaps in the few cases in which the law is obscure) limit any discretion now possessed by the judges. It would simply change the form of the rules by which they are bound."[57] This, as we will see, was not true in the case of the law of conspiracy.

Next, while maintaining the power of the judges to fill the gaps, Stephen's Code was to extinguish their power to create new law *ex nihilo*. However, he chose a compromising formula

[55] Ib., 360.

[56] Ib., 351.

[57] Ib., 352-3.

that would on the one hand "answer to any cry which might be raised as to the danger of a general repeal of the unwritten common law than upon any more serious grounds," while on the other hand would virtually abrogate the criminal common law. That formula had been first put into writing in the Indian Penal Code and provided that "every person should be liable to punishment under it, *and not otherwise*, for every act to which it applied."[58] Such a provision would "put an end to a power attributed to the judges, in virtue of which they have (it has been said) declared acts to be offences at common law, although no such declaration was ever made before."[59]

However, since there is no explicit repeal of the common law, if "any one were [sic] to do an act which would have been criminal before it passed, and which was not forbidden by its provisions, he would still be liable to punishment under the old law."[60] Obviously, the success of this strategy depends on how exhaustive the Code is. In order to prevent the criminal law from reverting into unwritten law "any offence known to the common law… [ought not] unintentionally [be] omitted from the Code. If any such offence exists, it must be one which, after the most careful search and inquiry, was unknown to every member of the Criminal Code Commission, and is unmentioned in any of the voluminous text-books which… [should be] carefully searched from end to end. Such an offence, if it exists, can scarcely be of any real danger to society." Furthermore, one might argue that, this exhaustive codification, combined with the comprehensiveness of the criminal law would also prevent the common law from flourishing again through judicial interpretation. Only with regards to justification and excuse, did Stephen foresee the need for judges to have the power to fill the gaps.[61] Stephen was persuaded that maintaining the common

[58] Ib., 305. The Indian Penal Code 1860 s 2 provided that "every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof." Stephen's final version of the formula was like a much more convoluted: "Every one who after this Act comes into force is a party to any indictable offence shall be proceeded against under some provision of this Act, or under some provision of some statute not inconsistent therewith and not repealed, and shall not be proceeded against in England or Ireland at common law: Provided that when any offender is punishable both under this Act and under any other statute, every such offender may be tried and punished and punished under this Act or such other statute" Criminal Code (Indictable Offences) HC Bill (1879) [170] s 5. This proves that Stephen was ready to inject ambiguity when necessary.

[59] 3 HCLE 358.

[60] Ib., 305. Cf. Friedland, "Wright's Model," 326.

[61] 3 HCLE 360-1.

law of justification and excuse was beneficial since through this "a man morally innocent, not otherwise protected, may avoid punishment."[62]

In sum, Stephen's project of codification of the criminal law of England represented a compromise between Benthamite ideals and the forces which were opposed to them. Bentham conceived of the Code as a primary, rather than a secondary rule. It was first and foremost a written code of conduct for the citizen to follow. Hence it follows that it should be public and certain, its style simple and understandable, and its form rational and complete. By contrast, a criminal system based on unwritten rules such as those of the common law defeated all its purpose of guiding the conduct of the citizen as it was uncertain and unknown to anyone outside of the legal profession. This led to abuse and oppression, particularly through retroactive rules created by the judiciary in clear violation of the division of powers.[63] Bentham called this use of the power of the judiciary to declare the common law, that is, the idea that they were declaring existing law, a fiction.[64]

On the other hand, the legal profession was all too ready to denounce that the codification of the common law would deprive the legal system from its flexibility to adapt to social change. It was to appease their fears that Stephen pointed out that the criminal common law was a complete body of law, which combined with the doctrine of *stare decisis*, left very little flexibility to the judges indeed.[65] Codification would not abrogate the common law offences, but only try to prevent them from growing back again.

It follows from this strategy that sought to prevent the Hydra of judicial lawmaking that historical research was to play a major role in the codification process. History would be a preliminary stage aimed at ascertaining and mapping out all the criminal common law with

---

[62] K. J. M. Smith, *James Fitzjames Stephen. Portrait of a Victorian Rationalist* (Cambridge: Cambridge University Press, 1988), 81, citing *Nineteenth Century*, 7, 1880, 140.

[63] Ib., 74-5.

[64] Stephen thought that the sense Maine gave to this term as "'any assumptions which conceal or affect the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified'…includes all such alterations as have been introduced into English law by the fiction that the judges possess a reserved fund of law, which they promulgate as often as a novel set of facts comes before them which require its promulgation. In other words, it includes all judicial legislation," James Fitzjames Stephen, "English Jurisprudence," *The Edinburgh Review* 114 (1861): 475. The first sense of *fiction* was a source of obscurity and inconsistency as old rules were perpetuated while the real rules remained hidden. The second sense of declaration as a fiction has to do more with *ex nihilo* legislation, and this is a cause of uncertainty and retroactive legislation; Smith, *Fitzjames*, 50, 76. We will see how these two senses of *fiction* bore upon Stephen's understanding of the history of the law of conspiracy.

[65] Smith, *Fitzjames*, 77-8, 82.

precision and detail. Next, we are going to see how these ideas revealed themselves in the debate about the law of conspiracy.

1.1.3 The Instrumental Theory of Conspiracy and the Wide Rule

Stephen's interest in the offence of conspiracy went back a few years before the gas stokers case. As we will see, the argument by which he appealed to the trade unions to join forces in the codification of the criminal law, according to which this offence had been used by the judiciary, was not new either. But his view on this offence was more nuanced that what his involvement in the debate that followed that case might suggest. In his very first comprehensive work on the criminal law he started out with Lord Denman's antithesis defining conspiracy as "a combination to do an unlawful act, or to do a lawful act by unlawful means." According to Stephen this was "not really an antithesis at all. The real definition would be a combination to do an unlawful act whether that act is or is not the final object of the combination." He also explained that within that definition "the word 'unlawful' is taken in so wide a sense that it might include almost any form of immoral, unpatriotic, disloyal, or otherwise objectionable, conduct which involves a plan concerted between two or more persons."[66] Expressed in this way conspiracy appeared as one of those general rules that gave wide discretion to the judges. Indeed, for Stephen far more important than this rather substantive definition of vague boundaries was what was going on behind it:

> To the present day judges exercise a modified power of legislation in declaring certain acts to be criminal on the broad ground of their immorality and tendency to injure the public, but they do so by the aid of a fiction so refined that it is difficult, at first sight, to see that it is a fiction. This fiction consists in treating as a crime, not the very acts which are intended to be punished, but certain ways of doing them. The law of conspiracy is, perhaps, the most complete illustration of this. According to the law of conspiracy, a crime may be committed by the agreement of several persons to do an act which, if done by a single person, would not have been criminal…the power of determining what specific actions men may not combine to do is, in reality, a legislative power; and it is the form of legislation by means of which the courts most frequently exercise in the present day the prerogative, which in former times was distinctly claimed for the Court of King's Bench, of being the *custos morum*.[67]

[66]Stephen, James Fitzjames, *A General View of the Criminal Law of England* (London; Cambridge: MacMillan and Co., 1863), 148. Cf. 2 HCLE 229: "'unlawful' being used in a sense closely approaching to immoral simply, and amounting at least to immoral and at the same time injurious to the public"

[67] Stephen, *General View*, 62.

This passage contains, in a nutshell, Stephen's view on the common law of conspiracy. Firstly, in using this wide principle, the courts were not applying it to the present case, but were secretly exercising the legislative power to punish what the judges thought immoral or dangerous to the public, or, as he put it, the prerogative of "being *custos morum*." Secondly, Stephen does not mean by fiction the improper use of a rule to work a desired effect, in a rather instrumental way. In this case, the rule itself gives wide discretion to the judges. The fiction here might be called metonymic fiction. This "plan concerted by two or more people" is an ingredient of the conducts that the courts thought it necessary to punish, but the courts punished it as if it were the main crime when in fact it was just a circumstance aggravating such conducts. In other words, there are certain conducts which may not amount to more than a civil wrong, but that become aggravated when other circumstances concur such as when more than one person gets involved in them in a concerted way. The way the courts have found to punish these aggravated wrongs is by punishing only a part of them, the planning and acting together. Thirdly, this empty façade of an offence implies that the case law of conspiracy should not be studied and analyzed with a view to construct a coherent category of substantive law, but rather with a view to reconstruct the offences that had grown out of its application. It is a totally different way of approaching the interpretation of the case law, less concerned with extracting the principles expressed in the cases than with asserting the policy considerations behind it. In other words, once given this wide rule, Stephen would be less concerned with forming a theory of the law of conspiracy, a coherent doctrine, than with spelling out the offences created through its fictitious use. This would be a major departure from the traditional approach to the offence of conspiracy that one might find in the treatise literature. That is, instead of the fusion of the cases in one single theory, he would do the fission and parceling out of the category in a series of discrete offences.

Stephen frames the wide rule in two ways that are not exactly equivalent. On the one hand, he talks of conspiracy as "a crime that may be committed by the agreement of several persons to do an act which, if done by a single person, would not have been criminal" On the other hand, it would be "a combination to do an unlawful act whether that act is or is not the final object of the combination." If by *unlawful act* we understand, as Stephen does, a category embracing both criminal acts as well as acts that under some normative system, whether axiological or utilitarian, would be considered reprehensible, then the former definition includes the latter, but not the other way around. In other words, the first definition may include acts that are lawful, and therefore not

reprehensible under any moral system. Furthermore, for Stephen, the uncertainty of this definition lies in the term *unlawful*, which enables the court to decide which conducts to make punishable. But what does the *agreement* mean anyway?

Expressions like "agreement to do an act" or "combination to do an unlawful act" are in themselves ambiguous and can mean several things. To be more precise, they can evoke different frames. If two people agree to do something, it means that they plan on doing something together, and that they therefore have a common or shared purpose. In other words, they are ready to cooperate toward some common purpose. The frame of cooperation in which two or more people work together toward some common purpose presupposes that these people have planned and agreed on that before. Thus, the idea that these expressions clumsily hint at is that of cooperation between many individuals as an element that aggravates a conduct that would otherwise have been merely immoral. For instance, as Stephen puts it, "a man might innocently issue a circular calculated to deceive the public as to the trade which he carried on; but if the directors of a joint-stock bank conspired to do so, they commit a crime."[68] Similarly, there are certain lawful individual conducts which may change their nature when performed in a coordinated way with a view to produce an aggregate effect, as when workers decide not to work.

1.1.3.1 The History of the Wide Rule

As for the origins of this wide principle, and how it became an offence, in the *General View*, Stephen offers a strange explanation of why "conspiracy, which is one out of the many possible aggravations of an act, should have been selected as the one by which its criminal character should be determined." Namely:

> The probable explanation is, that in earlier times the most prominent conspiracies were usually attended with great violence, and that, in defining the crime words were used which included offences of much less importance than those which were originally contemplated. The statute 33 Ed. I st. 2, which contains a definition of conspirators, shows what sort of offences the legislature had in their mind, though their definition includes many minor offences; just as the definition of highway robbery—which was suggested by armed horsemen, who made a profession of plunder—is generally applied in the present day to some commonplace criminal, who pulls a few shillings out of the pocket of a drunken companion on his way home from a public-house.

[68] Stephen, *General View*, 61.

If I'm not mistaken, what Stephen means here is that the conspiracy was born as a statutory offence, that of an agreement to falsely maintain pleas and false accusations. However, it was later put in more abstract and general terms, as embodying the offence of an agreement to do something unlawful. These terms included conducts much less serious that the ones that had initially prompted the statute. In other words, conspiracy was born as a statutory, very concrete and *ad hoc* offence, and was likely subsequently generalized by the courts at some point while keeping its nature of being a punishable offence.

In this work, Stephen gives no account about when and how the law of the statute Definition of Conspirators 1305-6 (33-34 Edw 1) was generalized. He later completed this historical sketch, but did so by giving a different account as to how the wider rule had emerged. He pointed out that "conspiracy was the very first crime which was ever defined by statute," and that the offence the statute created:

> was levelled at an abuse which perverted the whole course of justice, and frequently produced disturbances bordering on civil war—the banding together of the nobility and their tenants against each other, either by perverting the course of justice or by violence. When a powerful man wanted to dispose of his enemy by the help of his tenants and other dependants, he could either prosecute him maliciously in some of the criminal courts… or attack him with the strong hand. In either case the parties had to 'confeder or bind themselves' together.[69]
>
> Later, the Star Chamber extended its jurisdiction over this offence and in:
>
> One of its decisions (the Poulterers' case) first established the doctrine that an agreement to commit a conspiracy as defined by the statute of Edward I, was itself a misdemeanor, although no overt act of maintenance or the like followed upon it—a decision which, I think, the words of the statute would warrant. Be this how it may, much of the present law consists of an expansion of this principle and its application to other offences than the crime of conspiracy as defined by the Act of Edward I.[70]

Stephen then goes on to explain how the "doctrine that acts highly immoral or mischievous might be treated as crimes, though they fell under no recognized head of criminality," that is, the idea that "down to comparatively modern times the courts of law exercised a very wide discretion in determining that large classes of acts were criminal, not because they were breaches of any specified law, but because they were highly mischievous to the public," combined with "the

[69] Stephen, *Conspiracy*, 4.

[70] Ibidem.

doctrine established by the Poulterer's case" to produce the law of conspiracy, that is the law that "all combinations of two or more persons for an unlawful purpose are themselves criminal."[71]

In this passage, Stephen is being vague and obscure. He justifies not giving more details about the process by which the combination of these two doctrines yielded the law of conspiracy in that "it would be tedious to trace out in detail." At first sight, it may seem that Stephen is suggesting that the *Poulterers' Case* doctrine that "an agreement to commit a conspiracy as defined by the statute of Edward I, was itself a misdemeanor, although no overt act of maintenance or the like followed upon it" embodied an embryonic form of the doctrine of attempts, that may develop as it was applied "to other offences than the crime of conspiracy." But the idea of an agreement to commit a crime as a sort of attempt is very different from the idea that "combinations of two or more persons for an unlawful purpose are themselves criminal." The latter describe a substantive offence, no matter how vaguely, whereas the former derives its criminality from the crime these persons agree upon. To put it in different words, the notion of attempt is always relative to a criminal conduct. The agreement would be punished as an attempt at the crime in question and not because it is in itself considered to be criminal. But then, how does the wide rule arise from this narrower one that is limited to attempts as Stephen suggests? One possible interpretation is that what Stephen means is that as the courts at the time also punished conducts that were immoral or mischievous as criminal though not under any statute, conspiracies to commit such immoral conducts were punished as attempts. Thus, they would have passed on to the case law, and when the courts no longer punished such conducts, courts would have generalized the law of conspiracy under this wide principle including agreements to commit crimes, and also immoral or mischievous conducts. In this case, the new wide principle would no longer include the idea of attempt, though agreements to commit crimes could be punishable under it.

However, we should keep in mind the ideas Stephen had expressed in the *General View*. There he was less interested in establishing a concept of conspiracy than in explaining the use of the law of conspiracy to produce certain desired outcomes. And for that purpose, he needed a wider, rather than a narrower rule. The best explanation is that he was trying to integrate within the theory he had expressed earlier in the *General View*, the account of the origins of the modern law of conspiracy of people like Wright who thought rather that the law of conspiracy was basically

[71] Ib.

a branch of the law of attempts.[72] Central to Wright's argument was the doctrine that was born in the Star Chamber out of the precedent of the *Poulterers' Case*. Probably because the wider rule included the punishments of attempts, though it could not be reduced to the idea of attempt, and without being specific as to how it was transformed, Stephen engulfed the doctrine of the Star Chamber and made it an intermediate stage in the emergence of the wider rule. Indeed, later, in his *History of the Criminal law of England*, referring to the wider rule, he would say that "conspiracy has much analogy to an attempt to commit a crime," and then maintain that "the Star Chamber first treated conspiracies to commit crimes or indeed to do anything unlawful as substantive offences."[73] However,, as we have already seen, the wide rule expressed the idea of criminal cooperation rather than the idea of attempt: the idea that "on the one hand, isolated acts of wickedness or vice shall not be treated as crimes, and that, on the other, combinations for a wicked purpose shall be treated as crimes though the act to be done would not be a crime if done by an individual."[74] That is, it expressed the idea that concerted planning made certain conducts criminal, and that the courts, for lack of a better tool, had punished them on the grounds of their concerted planning.

So, whereas in the sketch of the *General View* the wide rule derived from the medieval statute, in this new historical sketch, the wide rule derives from a principle established in a case related to the medieval statute. In this way, a distinction appeared between a medieval offence of conspiracy and a modern one, which was conceptually unrelated to the medieval one, though historically connected to it. At this point, he stuck to the idea expressed in the *General View* that links the medieval offence of conspiracy to the conduct of maintenance, to the rivalries between noblemen within the context of what would be later called bastard feudalism. Furthermore, though the letter of the statute giving the definition of conspirators embraced other forms of *perversion of justice*, he limited the medieval conspiracy to the incitation of false prosecutions. Later, however, in keeping with the idea that modern and medieval conspiracies were conceptually unrelated, in the *History*, the medieval conspiracy would become primarily a civil wrong rather than an offence,

[72] It has been mentioned earlier how both Wright and Stephen were involved in the process of the Jamaica Penal Code. Wright's treatise on the law of conspiracy (see below) was published within a month of difference with Stephen's article on the same subject (Curthoys, Government, 178).

[73] 2 HCLE 227, 229.

[74] Stephen, *Conspiracy*, 4.

and the link between medieval conspiracy and maintenance would disappear, and would instead be replaced by the link between the medieval conspiracy and the modern malicious prosecution:

> The earliest meaning of conspiracy was thus a combination to carry on legal proceedings in a vexatious or improper way, and the writ of conspiracy, and the power given by the *Articuli super Chartas* to proceed without such a writ, were the forerunners of our modern actions for malicious prosecution. Originally, therefore, conspiracy was rather a particular kind of civil injury than a substantive crime, but like many other civil injuries it was also punishable on indictment, at the suit of the king.[75]

1.1.3.2 Special Conspiracies

As stated earlier, Stephen was not as concerned with coming up with a substantive offence of conspiracy as with the exercise of legislative power that the courts had carried out through this wide rule. Therefore, for Stephen, the codification of the law of conspiracy involved the detailed listing of the offences that had emerged out of the instrumental application of this doctrine, and their arrangement under the headings of the categories of offences they really belonged to. As we have already seen, for Stephen, the conspiracy was an element of these offences. This element had fictionally been used to punish them, but they could not be reduced to conspiracy only. There was no substantive offence of conspiracy, but rather fictional uses of the wide conspiracy. In this regard, I will talk of the special conspiracies approach to distinguish it from the approach that would consist in creating a single unified general category of conspiracy, maybe with the specification of several subcategories of conspiracy, or with the similar approach of reducing conspiracy to a single type of offence. This approach, as will be seen, reflected more closely the casuistic and unprincipled growth of the common law. This may be due to Stephen's strategy of repealing the common law only with reference to the offences included in the Code, rather than using a general wholesale abrogation of the common law.

Already in 1873, Stephen put forth an outline for parceling the law of conspiracy "under the heads of conspiracies combinations for any of the following purposes: 1. The perversion of justice. 2. The commission of crimes. 3. The promotion of political disturbances. 4. Fraud. 5. Immorality. 6. The restraint of trade. 7. The Injury of individuals by means other than fraud."[76] It should be noted how in this arrangement, conspiracy as an attempt is just one more type of special conspiracy rather than the core of a substantive category. In Annex I, one can chart how Stephen

[75] 2 HCLE 228.

[76] Stephen, *Conspiracy*, 4.

developed this outline through the *Digest of the Criminal Law*, which he intended as his move towards the codification of the criminal law of England,[77] and the *Draft Penal Code* he finally prepared, and under what types of offences he finally placed these headings. A quick look suffices to realize how faithfully Stephen translated the casuistic growth of the law of conspiracy. For instance, despite including the definition of conspiracy to commit a crime as "when two or more persons agree to commit a crime,"[78] Stephen Code's still goes on to define offences that would be included within this such as the conspiracy to kill the Queen[79] or the conspiracy to commit murder.[80]

1.1.3.3 Restraint of Trade

With regards to the conspiracy in restraint of trade, Stephen claimed that, before the passing of the Act of 1825, "every combination to affect the rate of wages was regarded as a conspiracy, though it admits of much argument whether this was by virtue of a principle of the common law of because the old combination laws then in force made the objects of the combination criminal in themselves."[81] In saying this, Stephen was echoing Wright's central arguments; that isolated precedents of conspiracies in restraint of trade before these acts were not such but rather cases of attempt (i.e. conspiracies) to commit crimes under the Combination Acts. Stephen, as usual, remained on the fence. Later, he would concede that "no case has ever been cited in which any person was, for having combined with others for the raising of wages, convicted of a conspiracy in restraint of trade at common law before the year of 1825."[82] He would nonetheless add that it was also true that there were some dubious cases that "explain the undoubted fact that in the year 1825 an impression prevailed that a combination to raise wages would constitute an indictable conspiracy."[83]

---

[77] Smith, *Fitzjames*, 78.

[78] James Fitzjames Stephen, *A Digest of the Criminal Law*, 4th (London; New York: Macmillan and Co., 1887 [1877]), 38.

[79] Criminal Code (Indictable Offences) s 75.

[80] Ib., s 180.

[81] Stephen, *Conspiracy*, 5.

[82] 2 HCLE 209.

[83] Ib., 211.

This Act of 1825 narrowed the criminal law of conspiracy "by permitting combinations for the purpose of regulating wages," and extended it "by subjecting various forms of intimidation and molestation to special penalties, whether practiced by individuals or by combinations of individuals." Finally, Stephen continued, the Criminal Law Amendment Act of 1871 had given trade unions immunity from this newly found conspiracy in restraint of trade "unless their object is to compel masters or workmen to do or not to do certain specified acts either by violence or threats of violence to person or property, or by picketing or by *rattening*."[84]

However, coming to Brett J's principle in the gas stoker's case, he conceded that it could be classified as a conspiracy "for the purpose of injuring individuals by means other than fraud," consisting in the agreement "to compel a person by the force of numbers to do against his will anything which causes him loss or pain." Though Stephen implied that this was indeed a case of judicial legislation, he foresaw that the principle could fill gaps in the criminal law, particularly with reference to those cases in which "a person [is] singled out for persecution by his enemies." However, he conceded that this principle "overlaps the exceptions which legalize what used to be conspiracies in restraint of trade… the evil of maintaining a vague and loose doctrine which may be so used as to render nugatory a statute passed in order to settle a long and warm controversy seems to… overbalance the value of the bare chance of its being useful in some strange and new combination of circumstances."[85]

This principle was an attempt at coming up with a formula wide enough to determine when collective action might be considered illegal other than when it aims at coercion. He imagined such cases as trade unions bringing "their power to bear on employers in order to effect political or religious objects," or for instance "a deliberate combination to ruin an author or a professional man [such as] a body of people combined to hiss an actor whenever and wherever he appeared… or to watch a man and sue him in civil courts whenever an excuse for doing so occurred."[86] In the present case of the gas stokers it was a work stoppage with the purpose to force an employer to reinstate campaign organizers. Under this principle, the questions would be whether that was a legitimate purpose under the Criminal Act Amendment Act and whether they intended to injure the employer.

[84] Stephen, *Conspiracy*, 5.

[85] Ibidem.

[86] Ib.

There is a problem of circularity with this definition because the "means other than fraud" is in this case the "force of numbers," that is, acting in combination. So, this would be a combination to injure an individual by acting in combination. Or, to put it in other words, it was cooperation with the purpose of acting in cooperation. This is a consequence of the schizophrenic way of conceptualizing collective action from the point of view of the agreement, so that the whole point is not determining when acting together or in concert is illegal but when agreeing to act together is illegal, and then punishing the acting together because it was preceded by an illegal agreement.

As said earlier, Stephen's considerations on the law of conspiracy took place within the context of the call of the Home Office to determine whether the Criminal Law Amendment Act should be amended, or the common law of conspiracy amended or abrogated altogether. Stephen's recommendations departed from the pursued policy of carving exceptions to the common law of conspiracy, which in his words was "like trying to scoop a hole in quicksand."[87] That left only two options, either amending the statute or the common law. Ideally, as his outline of special conspiracies pointed out, the best option for Stephen would have been to codify the law of conspiracy, but he feared "that our prospect of an English Penal Code is very remote." Furthermore, he warned that "the law of conspiracy is the part of the criminal law which should be codified last… the law relating to political offences, to cheating, and to intimidation ought to be put into a much more definite condition that they are in at present before the law of conspiracy which patches up their defects can be safely repealed." Therefore, Stephen was not favorable to unifying and simplifying solutions such as that of the Indian Penal Code, which reduced conspiracy to a form of abetment[88] as long as the criminal law of England showed gaps in areas like the offences against public justice, cheating, intimidation and insult.[89]

Stephen recommended to amend the law of conspiracy so as to provide "as a general rule, qualified, if necessary, by special exceptions, that no conspiracy to commit any offence should be punished more severely than the offence itself might have been punished if committed," and also "limiting the law of conspiracy as to acts directed against *individuals* to cases in which the object was to be effected by the perversion of the course of justice, crime, and fraud, the law relating to

[87] Curthoys, *Government*, 178.

[88] ss 107, 108.

[89] Stephen, *Conspiracy*, 5.

conspiracies *affecting the public* at large being left as it stands at present."[90] Thus, by the end of this article, which, with the excuse of the debate about the gas stokers, had allowed him to sketch his plan for the codification of the law of conspiracy, Stephen introduced a new principle, a principle that he had mentioned earlier, the principle he really believed should have controlled the gas stoker's case. This principle was that such work stoppages as the one the gas stokers were involved in were illegal insofar as they affected the public at large.

1.1.3.4 The Repeal of Conspiracy

How did Stephen finally go about these recommendations in his Penal Code? Firstly, as can be seen in Annex I, he pretty much carried over the special conspiracies into the Code, and did not give a general, substantive definition of the offence of conspiracy. Furthermore, at first sight, since there is no trace of it neither in his *Digest* nor in his *Draft Penal Code*, it seems that Stephen omitted the special conspiracy "for the purpose of injuring individuals by means other than fraud." In the *Digest* he defined the conspiracy in restraint of trade as "an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade,"[91], adding that "the purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful," and that " no act in contemplation of furtherance of a trade dispute between employers and workmen is unlawful… unless a person doing it would be punishable for it on indictment, or liable to be imprisoned… on summary conviction."[92] That is, only when the purpose of trade unions was to commit a crime were them punishable. And the punishment should not exceed the punishment for the offence they agreed to commit.[93]

The principle that collective action was sometimes criminal independently of the criminality of the purpose slipped into his *Digest* in the form of the *undefined misdemeanor* of *acts involving public mischief* because "acts deemed to be injurious to the public have in some instances been held to be misdemeanors… although such first mentioned acts were not forbidden by any express law, and although no precedent exactly applied to them… in the case of agreements

[90] Ib.

[91] Stephen, *Digest*, art. 390.

[92] Ib., art. 391.

[93] Ib., art. 392.

between more persons than one to carry out purposes which the judges regarded as injurious to the public, in which case such acts have been held to amount to the offence of conspiracy."[94]

However, this suggested misdemeanor did not figure in Stephen's *Draft Criminal Code*, for the very same reason that there were no provisions limiting the prosecution of agreements in restraints of trade to criminal purposes. As the Royal Commission in charge of reviewing it put it in its report, "the Bill repealed in effect all common law offences for which it provides substitutes, but left untouched all common law offences for which it did not so provide… the sections of the Draft Code which deal with this subject comprise treasonable conspiracies… seditious conspiracies… conspiracies to defile women… conspiracies to murder… conspiracies to defraud… conspiracies to commit indictable offences… and conspiracies to prevent by force the collection of rates and taxes… the law as to trade conspiracies we have left untouched" (Criminal Code Bill Commission 1879, 16). This was the reason why trade unions were disappointed with Stephen's *Draft Criminal Code* and blocked it in Parliament, though considering the *Digest*, it does not seem that this was Stephen's choice.

As for the wide rule, the Royal commission argued that "an agreement to do an 'unlawful' act has been said to be a conspiracy; but as no definition is to be found of what constitutes 'unlawfulness,' it seems to us unsatisfactory that there should be any indictable offence of which the elements should be left in uncertainty and doubt."[95] Yet, since the Code could have explicitly repealed this principle, no matter how dubious its existence was, this begs the question of whether this was a loophole that gave the courts the opportunity to revive the law of conspiracy again.

1.1.4 The Attempt Theory of the Law of Conspiracy

As stated earlier, at the time the debate of the law of conspiracy broke out, Stephen was working with Robert Samuel Wright in the drafting of the Jamaica Penal Code, and joined forces with him to bring workers to the cause of the codification of the criminal law of England. I also mentioned that Wright's own intervention in that debate came out just within a month of Stephen's. Wright was a longer monograph, and judging from its content, there is no doubt that both men

[94] Ib., art. 160.

[95] Criminal Code Bill Commission, *Report of the Royal Commission Appointed to Consider The Law Relating to Indictable Offences*, (London: George Edward Eyre and William Spottiswoode, Printers to the Queen's most Excellent Majesty, for her Majesty's Stationery Office, 1879), 16.

were communicating with each other and sharing their ideas about how to deal with the law of conspiracy.

1.1.4.1 ATTEMPT BY CONSPIRACY

Conceptually, Wright conceived the law of conspiracy as a part of the law of attempts. That is, he understood the attempt by conspiracy as a type of attempt, in the same way that the Indian Penal Code had made the accomplice by conspiracy a type of accomplice. In his own words, "the law of conspiracy is in truth merely an extension of the law of attempts, the act of agreement for the criminal purpose being substituted for an actual attempt as the overt act."[96] Under this definition, the meaning of *agreement* seems to be that of some external act by contrast to the purpose it expresses.[97] Indeed, the agreement works both as evidence of the intent as well as an overt act: "the mere act of agreement for execution of a criminal design being treated not merely as a sufficient evidence of the design but also as an 'overt' act or act in furtherance of the design." However, as he himself absurdly admits, "it is seldom that direct proof occurs of an actual agreement by words or signs, and the agreement is commonly inferred from apparent concurrence in acts which might of themselves be made to serve the same purpose,"[98] but would not these acts be an attempt themselves? Is it not absurd to make the agreement the attempt, and the attempt evidence of the agreement?[99] Furthermore, Wright contradicts this view elsewhere and defines *agreement* as "a mere mental state or state of agreement or concurrence: —an act or state which in itself is plainly neutral and conveys no associated idea of praise or blame."[100] In that case, the agreement cannot be an overt act. Indeed, his use of the term *overt act*, traditionally an act in evidence of a criminal intent, betrays the intention to fit the vocabulary and the rules of the volitional doctrine of the attempt in the clothing of the modern substantive view of the attempt, and it shows the tensions this causes. Indeed, to create even more confusion, at some point Wright assimilates *overt act* to the *actus reus* that is necessary to complete a crime: "every crime consists

[96] Wright, R. S., *The Law of Criminal Conspiracies and Agreements* (Philadelphia: The Blackstone Publishing Company, 1887 [1873]), 48.

[97] Ib., 50, 54.

[98] Ib., 63.

[99] Ibidem.

[100] Ib., 62-63.

of a state of intentionality—some form of intention or of carelessness—and an overt act or an omission to perform a duty."[101]

The main consequence of making conspiracy a kind of attempt was that the law of conspiracy became "merely an auxiliary to the law which creates the crime,"[102] since "an agreement or combination is not criminal unless it be for acts of omissions (whether as 'ends' or as a 'means') which could be criminal apart from the agreement.[103] That is, the criminality of the agreement derives from the criminality of the purpose, which is supposed to be a statutory or common law offence. That means that within this view, it is not up to judicial interpretation, and therefore judicial discretion, to determine whether the conspiracy was legal or not by declaring the purpose to be unlawful independently of any law or precedent.

Wright traced back the origins of this doctrine to the Star Chamber and the *Poulterers' Case*:

> The modern law of conspiracy has grown out of the application to cases of conspiracy, properly so called and as defined by the 33 Edw. 1, of the early doctrine that since the gist of crime was in the intent, a criminal intent manifested by any act done in furtherance of it might be punishable, although the act did not amount in law to an actual attempt… [it was] finally settled… in 1611 (Poulterers' Case), that although the crime of conspiracy properly so called, was not complete unless in case of conspiracy for maintenance some suit had been actually maintained, or in a case of conspiracy for false and malicious indictment the party against whom the conspiracy was directed had been actually indicted and acquitted… the agreement for such a conspiracy was indictable as a substantive offence, since there was a criminal intent manifested by an act done in furtherance of it, viz., by the agreement and from this time, by an easy transition, the agreement or confederacy itself for the commission of conspiracy came to be regarded as a complete act of conspiracy, although traces of the original distinction between a completed conspiracy and the mere agreement or confederacy to commit it long continued to be found… and grew into a rule that a combination to commit or to procure the commission of any crime was criminal and might be prosecuted as a conspiracy, although the crime might have nothing to do with the crime of conspiracy properly so called.[104]

In this passage, Wright thinks that the application of the doctrine that the will must be taken for the deed (when there is some overt act showing the former) to the medieval law of conspiracy

[101] Ib., 54.

[102] Ib., 63.

[103] Ib., 48.

[104] Ib., 6. See also p. 22.

"by an easy transition," and by generalizing the attempt to commit conspiracy within 33-34 Edw 1 to agreements to commit any offence became the modern attempt. There are several problems with this explanation. Firstly, apparently, he previously had said that the crime defined by 33-34 Edw 1 consisted in "confederacy or alliance for the false and malicious promotion of indictments and pleas, or for embracery or maintenance of various kinds,"[105] that is, an agreement to commit certain perversions of justice with no reference to a requirement of actual perversion of justice. Then, one might wonder, as Stephen did, whether the agreement itself is not within the law. Why is it necessary to invoke the doctrine of the will for the deed?

Secondly, Wright's thesis about the origins of this doctrine implies the bifurcation between modern and medieval conspiracy, which would be conceptually unconnected although historically related. However, if the principle first stated in the *Poulterers' Case* was that agreement to commit a conspiracy within 33-34 Edw 1 was itself a crime, and was then generalized into the principle that an agreement to commit a crime was a crime, why was this agreement called a conspiracy when it had nothing to do with the crime of conspiracy? As will be shown later, the context of the application of the doctrine that the will stands for the deed in the *Poulterers' Case* was very narrow. Indeed, I will establish the narrow basis of this case and show how Wright's explanation obscures the conceptual reasons for which this principle was invoked in the Star Chamber in this case in the first place. Furthermore, the idea of the agreement as the evidence of criminal intent is not explicitly mentioned in the *Poulterers' Case*, but rather in subsequent cases after the Star Chamber was abolished. Finally, the transition from the doctrine of the will for the deed to modern attempt was all but easy, contrary to what superficial analogies may suggest.[106]

1.1.4.2 The Wider Rule

As a part of his theory of the law of conspiracy as part of the law of attempts, Wright needed to disprove the opposite theory of the wide rule. Wright contended that "a suggestion of a general doctrine that a combination may be criminal, although that which it proposes would not be criminal apart from the combination, begins to appear in the arguments of counsels towards the close of the 17th century." Then, "by the end of the 18th century an impression appears to have

[105] Ib., 5-6.

[106] Sayre maintains that this doctrine was never the law, and argues that modern attempt emerged in the eighteenth century independently of any Star Chamber doctrine, Francis B. Sayre, "Criminal Attempts," *Harvard Law Review* 41 (1921): 821-859.

grown up amongst lawyers, which can only be described by the double proposition that a combination to do an unlawful act is criminal, and that in this phrase 'unlawful' does not necessarily mean 'criminal'."[107] As implied by the use of the words *suggestion* and *impression*, Wright did not believe that apart from these imaginations, the rule had ever been applied to any actual case. Thus, to debunk these opinions, he went through the case-law of conspiracy to find out whether there were traces of the wide rule.[108] And he organized his inquiry according to the arrangement laid down by Stephen into a series of discrete special conspiracies, integrating within his own argument Stephen's ideas.

With regards to the "combinations against the government." he argued that "these cases appear not perhaps to establish but still tend strongly to establish a rule that combinations directed against the government or public safety may be criminal, although the acts proposed might not be criminal in absence of combination: but they furnish no indication of the rule, supposing it to exist."[109] In the cases of "combination to pervert or defeat Justice" he found that "the acts proposed were, at the times when the cases were decided, punishable on indictment or information, or at least as contempt of court." Most of the acts combined upon in cases of "combination against Public Morals and Decency" were "punishable irrespectively of combination."[110] As for the "combination to defraud," they originally referred to criminal conducts, and "when certain kinds of cheats had ceased to be indictable when committed by one person, they continued to be indictable when done or planned by persons in combination."[111] With regard to the "combination to injure individuals otherwise than by Fraud," Wright held that "authorities on the whole strongly favor the view that… it is not as a general rule criminal unless criminal means are to be used… [though] expressions are to be found in some cases which imply a doubt as to the universality of the rule."[112] Finally, Wright, did not find any evidence that agreement in restraint of trade ever was

[107] Wright, *Criminal Conspiracies*, 9-10.

[108] Cf. Albert Venn Dicey, "The Combination Laws as Illustrating the Relation Between Law and Opinion in England During the Nineteenth Century," *Harvard Law Review* 27 (1904): 516, n (2).

[109] Wright, *Criminal Conspiracies*, 25.

[110] Ib., 26.

[111] Ib., 27.

[112] Ib., 33.

criminal and "up to the present the doctrine has not been established by any binding authority."[113] Furthermore, there was "not sufficient authority for concluding that before the close of the 18th century there was supposed to be any rule of common law that combinations for controlling masters or workmen were criminal, except where combination was for some purpose punishable under statute."[114] For that reason, he added that "if such a rule is established by cases decided since the passing in 1825 of the 6 Geo. 4 c. 129… this… is a modern instance of the growth of a crime at common law by reflection from statutes, and of its survival after the repeal… somewhat in the same manner in which combinations for certain kinds of frauds continued to be criminal after those frauds had ceased to be punishable apart from the combination."[115] Wright, like Stephen, believed the law of conspiracy as applied to trade unions to be a very recent invention. The only difference is that Stephen gave legitimacy to this recent development through the power entailed in the wider rule, whereas Wright's assimilation of the law of conspiracy to the law of attempts made this a flagrant unwarranted interference of the courts into the sphere of legislation.[116]

In sum, Wright's analysis of the cases out of which Stephen's special conspiracies would have emerged, strongly suggested that many of these cases could be explained by reference to the doctrine of the attempt by conspiracy, as survivals of former crimes which had stopped to be punished. Other cases are simply inconclusive or equivocal. In any event, for Wright, there is no evidence of the application of the wide rule. In that sense, Lord Denman's antithesis had been misinterpreted as declaratory of a general principle when it was "not intended to be a complete definition of criminal combination."[117]

---

[113] Ib., 35.

[114] Ib., 43-44.

[115] Ib., 44.

[116] Hedges and Winterbottom essentially agreed with Wright's thesis that modern conspiracy emerged out of the principle laid in the Poulterers' Case that "the offence of conspiracy might be committed by the mere act of combination falsely to bring an indictment, although no further steps were taken to effect the objects of the combination," and that whatever precedents there were of conspiracy against trade unions before the nineteenth century they probably constituted attempts to infringe statutes regulating trade unions. They concede, however, that although "decisions are few, and they disclose no satisfactory explanation of the theory on which they rested… the theory that combinations to raise wages were criminal at common law appears to have been generally accepted in the years immediately preceding 1799;" R. Y. Hedges and Allan Winterbottom, *The Legal History of Trade Unionism* (London; New York; Toronto: Longmand, Green, and Co., 1930) 14, 17-18.

[117] Wright, *Criminal Conspiracies*, 9-10.

Having said that, Wright examined the use of such a rule in the criminal system. In the case of minor offences, he conceded that "there may be cases in which the concurrence of several persons for committing an offence may essentially change its character, and so enhance its mischief that the joint act may properly be treated as a crime… but that whoever undertakes the task of criminal legislation ought to consider different kinds of minor offences separately, and to specify in the written law the kinds in which the guilt is liable to be treated as enhanced by combination."[118] With regard to breach of contract he also conceded that "so long as the law continues in any case to consider a breach of contract as a fit subject for punishment, it cannot be said that there may not be instances in which a concert to break, or even to counsel the concerted breach of such contracts may be properly visited with a punishment greater than that which is inflicted on a sole offender."[119]

Likewise, "acts which are not punishable in one person may properly be treated as crimes when they are done by several persons acting in agreement." This is particularly the case with regards to "acts which are necessarily collective and which cannot for physical reasons be committed by one person," as well as "certain frauds and perversions of justice, which ought to be punishable independently of the agreement" but are not, but can be reached "by a power to punish the concerted acts."[120] However, "this use of the doctrine involves an important delegation of a legislative power in a matter in which the exercise of such power ought to be carefully guarded, since the legislature admits its own inability to discover the principles on which legislation ought to proceed."[121] Other than these cases, Wright objected "to any general rule that agreement may make punishable that which ought not to be punished in the absence of the agreement."[122] Yet he again admitted that "there might be cases in which acts done by several persons in agreement ought to be punished, although the same acts ought not to be punished if done without agreement. But these cases ought to be specified and carefully defined."[123]

[118] Ib., 65.

[119] Ib., 65-66.

[120] Ib., 66.

[121] Ib., 68.

[122] Ib., 67.

[123] Ib., 68.

Wright's ambiguous final recommendations, wrapped up in a continuous rhetorical back and forth, are a perfect illustration of the complexity of interests involved in the debate on the law of conspiracy. It is clear that Wright thinks that the law of conspiracy should be reduced to a form of attempts, and that under no circumstance should the wide rule be considered for codification. Yet, at the same time, he is willing to make room within his own theory for Stephen's special conspiracies. In conclusion, though he admits that certain conducts could be aggravated by cooperation and that aggregate action might change the nature of that action, Wright cannot conceive of any general principle of liability for collective behavior that does not involve wide judicial discretion.

Wright's own view of the law of conspiracy was "undoubtedly inspired by his sympathy for the labor movement."[124] By narrowing down the scope of this offence, and linking it to existing offences, he was tying up the hands of the courts. By disproving the existence of the wide rule, he was depriving them of their tool. In that sense, the mere shadow of the existence of common law conspiracy before the landmark *Poulterers'* represented a threat. Thus, it should not come as a surprise that Wright devoted some lines in two notes that were probably added after the book was completed, to disprove Coke's assertion according to which the medieval conspiracy was in affirmance of the common law,[125] and the opinion expressed in the *Poulterers' Case* that there was a general common law of conspiracy. Indeed, Wright sets about to show that the medieval conspiracy was created through a series of statutes and that there was no reference to any common law conspiracy before that. As we will later see, one of the consequences of this thesis about the origins of the medieval common law was to make conspiracy a civil wrong, which later was also a made crime. This in turn gave preeminence to the meaning of conspiracy as it was later embodied in the writ of conspiracy, over the actual meaning that conspiracy might have had at the time of the enactment of those statutes. And this explains why Wright believed that "from very early times 'conspiracy' and 'confederacy' were distinguished as different crimes… 'conspiracy' becoming appropriated to false and malicious indictments, while 'confederacy' was especially used to designate combinations for maintenance."[126] Wright had the opportunity to put his ideas into

[124] Friedland, "Wright's Model," 326.

[125] 2 Inst 561.

[126] Wright, *Criminal Conspiracies*, 12.

practice in the Jamaica Criminal Code,[127] which, in contrast to Stephen's, abrogated the common law,[128] and he restricted the definition of conspiracy to the agreement to commit a crime, merging it with the Indian Penal Code theory of conspiracy as a form of abetment under the title "Abetment and Conspiracy," which was preceded by the title "Attempts to Commit Crimes."[129]

In conclusion, for Stephen, and most probably for Wright too, legal history was not an intellectual endeavor to pursue for its own sake. It was first and foremost a method aimed at revealing the existing law and its historical development as a prelude to codification. That means, firstly, that the historical inquiry was to be driven by the systematic goals of codification. History ought to yield materials ready for codification. As Stephen put it, "history and analysis, so far from being inimical, are complementary to each other, and neither can be dispensed with. History without analysis is at best a mere curiosity; and analysis without history is blind."[130] Analysis supplies "a starting point for any amount of historical investigation, by the help of which it will be possible to compare the degree in which various systems of law have embodied the great leading principles which ought to pervade all speculation on the subject"[131] It also means that the contextual constraints of the codification process were to shape the historical inquiry. Thus, the starting point of their historical inquiry into the law of conspiracy was guided by the need to ascertain the common law of conspiracy in order to stop its application to those practices of the trade unions that had been decriminalized by statute. They both began with their own theories as

[127] R. S. Wright, *Drafts of a Criminal Code and a Code of Criminal Procedure for the Island of Jamaica, with an Explanatory Memorandum* (London: Printed by George Edward Eyre and William Spottiwoode, Printers to the Queen's Most Excellent Majesty, for Her Majesty's Office, 1877), hereafter Jamaica Criminal Code.

[128] Jamaica Criminal Code s 5.

[129] S 35 defines conspiracy as happening when "two or more persons agree or act together with a common purpose in committing or abetting a crime, whether with or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet that crime," and likewise "a person abet the commission of a crime by another person, and such other person in any manner assent to the abetment, each of them is guilty of conspiracy to commit such crime, although it be not a part of the design of either of them that the person abetting the other should take any part in or towards the preparing for or committing such crime." The Indian Penal Code provides that "a person abets the doing of a thing who… engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing" (s 107). See also Friedland, "Wright's Model," 326. overall, Wright's code was more innovative than Stephen's, but it should not be forgotten that the former "experimentation in foreign parts was more readily acceptable to the British Parliament," Smith, *Fitzjames*, 270, n (53).

[130] Stephen, English Jurisprudence 1861, 481.

[131] Ib., 384-5.

to the nature of the law of conspiracy, and then worked out its history in a way that fitted and confirmed that theory.

1.2 Conceptual Continuity of the Law of Conspiracy

Bringing out the notion of cooperation as an element of certain crimes, and therefore related to Stephen's thesis that the aggravation of certain conducts by cooperation was used by courts to punish these conducts, J. W. Bryan elaborated a rather different account of the historical development of the law of conspiracy. In it, the common law of conspiracy dated back to the Middle Ages, and though it was not connected to the modern conspiracy through a line of precedents, there still existed a conceptual relationship between the two. It follows that Bryan's account contradicted both the bifurcation thesis as well as that of the statutory origins of the law of conspiracy. Indeed, modern conspiracy was rather a conceptual leap with regard to the medieval statutes, which now appeared as a historical accident that had truncated the common law of conspiracy.

Bryan based his thesis that there was a common-law conspiracy in that the statutes which first referred to conspiracy by name presumed the existence of an offence. Since these statutes did not define the term *conspiracy*, "it is obvious that the execution of these acts with justice and uniformity would have been impossible in the absence of an already existing body of custom supplying a more or less accurate description of the offence denounced."[132] He further argued that since these statutes only provided a civil remedy for this wrong, and 33-34 Edw 1 statutorily defining conspiracy for the first time directed the justice of *oyer* and *terminer* to have transcript thereof, there must have been an offence at common law which this statute put into writing.

It follows from that that offence of conspiracy preceded the civil remedy which was "probably an innovation."[133] However, in later developments, "the criminal aspect of conspiracy was far less important than the civil," and in those few criminal cases that we have records off, the substance "worked out by the courts in connection with civil actions of conspiracy were closely

[132] Bryan, *Conspiracy*, 10.

[133] Ib., 20.

followed."[134] So, in spite of antedating the civil remedy, the criminal conspiracy derived its substance from the way courts developed the civil remedy.

Drawing mainly from the Mirror of Justices, Bracton and Britton, Bryan inferred that the notion of the "special dangers to be apprehended from concerted evil-doing" was beginning to grow "in the virgin soil of the common law quite independently of the Edwardian statutes."[135] This notion did not appear first in an abstract and general way but in the context of an increase in "false accusations, vexatious suits, and fraudulent perversions of justice" naturally following the "improved methods of procedure in the king's courts." Particularly, the "perversion of a new process of indictment… would soon attract the attention of the judges." Since "such enterprises almost always require the coöperation [sic] of a plurality of performers… the judges would soon observe that the false prosecution might be in some degree hindered by an interference with the original combination." Thus, "the conspiracy would in time come to be considered as at least an element in the offence, and punished as such."[136] It was "an element to be taken into account, but was not in itself a complete crime."[137]

Thus, when the Definition of Conspirators was passed, "it was in the nature of a codification of existing law… intended to set out the entire law of conspiracy as it was then understood."[138] However, since the "conception of the offence had not as yet been logically and completely worked out by the legal thought of the age," the consequence of this statute putting into writing the common law was that it "clothed it with a finality and rigidity which prevented its gradual improvement by the slow and silent processes of the common law."[139]

In sum, the nub of Bryan's contention was that the notion of criminal cooperation was beginning to emerge in the common law by the thirteenth century, particularly within the context of false prosecutions, when the series of statutes dealing with conspiracy prematurely fixed its

[134] Ib., 53-54.

[135] Ib., 10-11.

[136] Ib., 12, n (19).

[137] Ib., 14. Bryan seems to contradict himself arguing later that the combination was the gist of the civil action at pp 37-38.

[138] Ib., 20.

[139] Ib., 22.

substance within the boundaries of a special conspiracy, thus preventing the courts, through the increase of the case law, from eventually reaching a general principle.

This seed of the modern concept of conspiracy that medieval courts had begun to approach would have to wait until the Early Modern Era to finally blossom. The first stage in the development of the modern conspiracy was the principle that "the bare unexecuted conspiracy is a complete offence."[140] Though Bryan found some authorities pointing out to this principle as early as the reign of Edward III, he agreed both with Stephen and Wright that "the great impetus toward the principle that an unexecuted conspiracy is criminal came from several cases decided in the Court of Star Chamber at the beginning of the seventeenth century."[141] These decisions culminated in the "famous Poulterers' Case… wherein… it was said that a bare conspiracy is punishable independently."[142] This decision was not supported by precedent, and departed from the principle of the criminal and civil law of conspiracy that "the offence was not complete until the person injured had been indicted, tried, and acquitted," as it has been developed by the courts since the passing of the Edwardian statutes. Yet, Bryan contended, the case was not decided upon this general principle expressed in the *obita* of the case, but rather on the narrow grounds that "persons guilty of concerted efforts to secure the conviction of an innocent person upon a capital charge may be punished for conspiracy, although the false prosecution end otherwise than in an acquittal by verdict." [143] In that sense, the *Poulterers' Case* mirrored in the criminal law the development of the civil action on the case. Thus, as later cases interpreted the *Poulterers' Case* as having been decided on the wider principle, "a doctrine probably valid as to a limited class of evil combinations thus came to be extended over the entire field of such enterprises," making this case "one of the historic landmarks upon the highway of English legal history."[144] Thus, by the early eighteenth century, "the principle that a bare conspiracy is punishable as a crime was accepted with little question."[145]

[140] Ib., 54.

[141] Ib., 55.

[142] Ib., 57.

[143] Ib., 58.

[144] Ib., 59.

[145] Ib., 65.

Bryan goes on to describe the growth of modern conspiracy according to the purposes with which this principle punishing cooperation was applied pretty much along the lines of Stephen's special conspiracies: "agreements to perform acts directly harmful to the public,"[146] "combinations to defame and to extort money by blackmail,"[147] "combinations to cheat or defraud,"[148] "conspiracy to commit a crime,"[149] "conspiracies to accomplish a merely immoral purpose,"[150] and "conspiracies among merchants and others to raise the price of merchandise, and among workmen to enhance their wages." Thus, "by the end of the eighteenth century, the definition of criminal conspiracy included combinations for a number of objects besides the older law."[151] In these cases, the idea that the "conspiracy is the gist of the offence quite independently of the acts done" was rarely applied, and "in most instances the combination was treated as an element in the offence, or as matter of aggravation, emphasis being laid upon the acts done."[152] Even in cases "in which it was held that the conspiracy was the gist of the offence, the acts done were described in some detail in the indictment."[153] Hence, except in a few passages, "the judges do not attempt, until the nineteenth century, to justify the punishment of a bare agreement to commit an unlawful act."[154]

1.3 The Medieval Conspiracy

Since Stephen and Wright maintained the bifurcation thesis, there was no use to dwell on the Middle Ages (unless it was to cast away the slightest possibility of a common law conspiracy prior to the Early Modern Period). Bryan, instead, defended that the history of the concept of conspiracy as "concerted evil-doing," and therefore gave far more space to the medieval conspiracy than Stephen or Wright. However, his was essentially a history of the rise and development of modern conspiracy, with a medieval prelude.

---

[146] Ib., 66.

[147] Ib., 68.

[148] Ib., 69.

[149] Ib., 71.

[150] Ib., 73.

[151] Ib., 74.

[152] Ib., 75.

[153] Ib., 76.

[154] Ib., 79.

The consequence of this is that very little was known about the medieval conspiracy. Furthermore, because of the focus on the modern conspiracy and the issues that the debate of the trade unions had raised, the focal point had exclusively been the origins of the medieval offence, with little or no attention at all to its development up to the Early Modern Period. The publication of Percy Henry Winfield's *The History of Conspiracy and Abuse of Legal Procedure* in 1921 was to fill this historiographical gap.

The very two elements juxtaposed in that title reflect both Winfield's approach to this subject as well as the origins of his work. As he himself tells us in the preface, the book had grown out of an original research on the history of the law of conspiracy that ended up becoming a book about the law of abuse of process, including its history. Though it initially was a single book, the modern part was later detached in a separate volume called *The Present Law of Abuse of Legal Procedure* (1921). Winfield confesses that he had had to "detach the historical from the modern part and to publish each of these separately instead of as one book… [but] this process of detachment was not altogether easy."[155] It follows that for Winfield, the study of historical legal development was an integral part of the description of the law, and that his was another exercise in the doctrinal history of conspiracy that was inaugurated with Stephen and Wright, and so much in line with contemporary attempts to "uncover and systematize the principles of tort law and contract."[156] It also follows that he was to focus on the development of conspiracy as a form of abuse of process, a legal category in which Winfield included other wrongs such as maintenance, champerty, agreements affecting legal procedure, malicious prosecution, abuses by judicial officers, embracery, and barratry.

This focus on the notion of abuse of legal procedure is precisely why Winfield turned to the Middle Ages. Almost half of this book on the history of the law of conspiracy deals with the growth of the medieval conspiracy, whereas a scarce ten pages address the development of modern conspiracy in the eighteenth century. Furthermore, Winfield attempted to grasp the substance of

[155] H. P. Winfield, *The History of Conspiracy and Abuse of Legal Procedure* (Cambridge: Cambridge University Press, 1921), xv. Suffice to point out a remnant of the former structure where the history of criminal conspiracy preceded that of the writ of conspiracy at p. 107.

[156] William Cornish, Michael Lobban and Keith Smith, *1820-1914: English Legal System*, Vol. 11 of *The Oxford History of the Laws of England* (New York: Oxford University Press, 2010), 130.

the wrong of conspiracy understood as an abuse of legal procedure almost exclusively from the writ of conspiracy and its interpretation in court during that period.

Winfield takes as a point of reference for the meaning of the medieval conspiracy the definition of conspirators contained in the ordinance of 33-34 Edw 1. He suggests that the ordinance codified a meaning which was already in use though maybe in a vague way; the meaning of a combination to abuse legal procedure.[157] But this is a general expression that embraces different conducts. More specifically, by abuse of procedure in the case of conspiracy, Winfield mainly refers to people binging or procuring false criminal charges against innocents.[158] Thus, he distinguishes between conspiracy as false accusation and the other wrongs originally listed in the Definition of Conspirators, such as maintenance and champerty, and consequently addresses these wrongs in separate headings as separate abuses of legal procedure. As stated earlier, Winfield derives the meaning of the medieval conspiracy from the form the writ of conspiracy took as a remedy mainly for wrongful prosecution.

This also means that Winfield deemphasizes the cooperative aspect of this wrong. Bryan had made "concerted evil-doing" the genus of which concerted wrongful prosecution was a species. For Winfield, "combined wrong-doing" was a necessary element of the writ of conspiracy, but not the wrong itself.[159] In that sense, his account appears to be consistent with Stephen's and Wright's bifurcation thesis, according to which the medieval conspiracy was essentially the wrong of false prosecution, and had nothing to do with the modern conspiracy that grew out of the principles first laid down in the Star Chamber.

However, Winfield indicates that there was evidence that "illegal combinations of other kinds… were known" to the common law before the statutes dealing with conspiracy, though the term "*conspiracy* does not seem to have been used to refer to them."[160] Likewise, there was some indication that combinations to abuse legal procedure were illegal though there was no clear formulation of the concept before the definition of conspirators.[161] And there was abundant

[157] Winfield, Conspiracy, 2-3.

[158] Ib., 4-27, 39-59.

[159] Ib., 59-66, 93.

[160] Ib., 3, 93-94.

[161] Ib., 94.

evidence that *conspiracy* was used to refer to illegal combinations of different kinds, including trade combinations, after the passing of the conspiracy statutes.[162]

In addition to that, Winfield distinguishes between the civil procedure by writ of conspiracy and the criminal procedure initiated by indictment and punished with the so called villainous judgment.[163] In contrast to Bryan, he seems to belief that the criminal procedure was not prior to the statute 4 Edw 3 c 11 (1330).[164] This implies that the substance of the offence was essentially the same as that of the wrong as developed by the courts from the definition of conspirators. At least that follows from the fact that Winfield is not specific about whether the prosecution of conspiracies embraced other abuses besides false prosecutions (Winfield, Conspiracy, 102-107). The only real difference between the two of them is that in the criminal proceedings the combination was the gist of it.[165]

So, far from subscribing to the bifurcation thesis, Winfield was closer to Bryan's thesis. For him the common law had come up with the idea of punishable combinations of certain kinds, and that combinations to abuse procedure were punished as such before the Early Modern Period. Maybe, because of that, Winfield's discussion on conspiracy in the Star Chamber is really brief and focuses only on the question of how the court extended its jurisdiction to conspiracy.[166] But no reference is made to the principles laid down in the *Poulterers' Case*. Indeed, for Winfield the Star Chamber was nothing but a stage in the process of expansion of the meaning of conspiracy, so that by the seventeenth century, "the original meaning was disappearing, save for the idea of combination, and it was not difficult to tack on to that idea almost any conceivable evil object that two or more persons might have."[167] As the process went on, "about the beginning of the 18th century, we have decisions or indications in decisions that criminal conspiracy had been extended to include combinations (1) to accuse, but not necessarily before a Court, of some offence; (2) to

[162] Ib., 109-110.

[163] Ib., 93.

[164] Ib., 95-96.

[165] Ib., 64.

[166] Ib., 107.

[167] Ib., 112.

commit embracery; (3) to cheat; (4) to sell goods at a fixed price… (5) to extort money."[168] The principle by this time was that "combination was the gist of the offence" and that the purpose of the combination need not be criminal in the sense of statutorily defined "where the combination is against the government… where the combination is to pervert justice, otherwise than by false accusation, though the perversion of justice may not be criminal apart from the combination… [possibly] combinations against public morals and decency… combinations to injure individuals otherwise than by fraud…[and possibly] combinations to raise wages… though such demands if made by individuals would not be."[169]

Thus, Winfield's thesis about the relationship between medieval and modern conspiracy was neither the bifurcation nor the leap, but rather the expansionary thesis. On the one hand, he derived the modern wider sense of conspiracy from the medieval criminal sense, though maybe not from the writ of conspiracy. On the other hand, he took pains to demonstrate that there was no common law conspiracy, neither civil nor criminal, before the statutes that created the writ first and provided a definition later.[170] The doctrine of modern conspiracy derived from a statute, but its meaning was the generalization of an idea that was already there rather than the expression of a brand-new principle. In other words, modern conspiracy ultimately derived from the law of abuse of legal procedure, at least in its criminal branch. Thus, we see how focusing on the medieval conspiracy changed the view as to how to understand modern conspiracy.

1.3.1 The Stationary Thesis: Conspiracies Against the State

Not much has been written about the medieval conspiracy since the publication of Winfield's book, but it is worth taking a big leap in our narrative to be able to witness a surprising turn in the history of the medieval conspiracy, and its relationship with the modern one. In the words of its proponent, the new historiographical thesis was that "the crime of conspiracy was not made by Star Chamber and the seventeenth-century courts, or by the courts at all: it took shape in the late thirteenth and early fourteenth century, and Parliament was concerned with it almost from

[168] Ib., 115.

[169] Ib., 116-17.

[170] Winfield, Conspiracy, 29-37, 94-93. Part of the value of Winfield's monograph lies in the antiquarian passion with which he scrutinizes formal aspects of the medieval conspiracy such as the date of the Statute of Conspirators. See pp. 22-29.

its own beginning as an institution, because it was always an offence against the public authority of the state."[171]

The nub of Harding's thesis relies on his interpretation of the concept of conspiracy during the Middle Ages. A conspiracy was a private sworn association against public authority. According to Harding, the conjuration or "oath-taking was the central element of conspiracy in the middle ages, when social order depended on oath of loyalty to lords and rulers which could be transformed into communal oaths of solidarity against the authorities" The oath-taking was particularly dangerous to the public authority not only because it "gave an objective form to political dissent making it distinguishable from the overt attacks on rulers in which it might be expressed," but also because it could subvert "the area of legal procedures and relationships, for these relied much on the oaths of witnesses and jurymen."[172]

Thus, "English lawyers were applying a wide concept of conspiracy to disrupt public administration."[173] Harding believes that the invocation of the concept that was circulating in the Middle Ages was prompted by the bill procedure in the mid thirteenth century and the subsequent "temptation to invent or embellish the bill of complaint, and to corrupt the jury which had to pronounce on its worth."[174] Conspiracy embraced not only this form of corruption of legal process but also "maintenance, embracery and champerty." And this idea of corruption of legal process by a sworn association "was joined to conspiracy in its political sense, for the developing processes of law and government were turned into a medium for harassment of one's enemies."[175] In sum,

> conspiracy was the first crime to be defined in parliament because it threatened the whole system of justice on which the state was being erected, and perverted the great new means of political communication between the king and his subjects by bills of complaint… conspiracy in the sense of private alliance, not treason narrowly defined as attacks on the royal persons, was the real crime against the state in the fourteenth century… that conspiracy was not assimilated to treason but remained a separate crime was because sworn

[171] Alan Harding, "The Origins of the Crime of Conspiracy," *Transactions of the Royal Historical Society* 33 (1983): 91.

[172] Ib., 92-93.

[173] Ib, 94.

[174] Ib., 95.

[175] Ib., 96.

alliances were too much a part of the aristocratic way of life for the king to be permitted to bring them within the scope of the penalties meted out to traitors.[176]

As for the modern conspiracy, Harding dismissed the idea that anything new had been decided in the *Poulterers' Case*.[177] What we call modern conspiracy "was not extension by judges from abuse of legal procedure to agreements for any purpose, but the definition of a number of substantive offences out of the multifarious criminal activities of sworn associations" which were considered as "subversive associations of the common people."[178]

Harding was very right in pointing out that "to understand the full significance of conspiracy in the development of English law and administration we need to shift our attention from the civil writ and "the case-law on which legal historians have tended to concentrate, rather at the expense of the statutes."[179] This focus on the statutes and their immediate effects led him to point out the clear conceptual connection between conspiracy as false prosecution and maintenance, champerty and embracery. And he was also right in focusing his attention on the conjuration or oath-taking as an element of the concept of conspiracy. But he fell victim to the same sin as his predecessors: the single-theory view of the history of the law of conspiracy.

He tried to reduce conspiracy to a single category of boundaries clearly defined and distinct from the growth of the case law. The merit of his definition of the concept of conspiracy is that for the first time he sought it outside the legal sources that have constituted the basis of the history of conspiracy. He did not seek it either in the medieval statutes themselves, or in the different principles laid down in its copious case law. Rather, he based himself on a general medieval use of the term to refer to the political plot or intrigue to overthrow the government. From this, he derived the concept of sworn association against the public authority. However, he had to construct this concept to include in it associations to pervert justice. It is obvious that such associations cannot be considered against public authority but in an interpretive way as associations that undermine the government or the whole community, though their primary purpose is not to overthrow the government. In this point, however, Harding is not very clear, and he seems to

[176] Ib., 99-100.

[177] Ib., 91-92.

[178] Ib., 101, 106.

[179] Ib., 98, 96.

associate the criminality of conspiracy to a medieval distrust of private associations, as if authorities always saw the potential for subversion in any association.

As I say, Harding is right in bringing out certain aspects of the medieval conspiracy that most authors have disregarded. But it seems far-fetched to conclude that modern conspiracy is nothing more than the medieval idea of private association "against the whole community" as applied to specific conspiracies. He is simply overstretching his single theory to explain the law of conspiracy as a unified whole under a single principle, which in his case implied a historical continuity, for this principle would have originated in the Middle Ages. His was a stationary thesis as to the relation between medieval and modern conspiracy.

Harding's interpretation illustrates the traps inherent to the study of *conspiracy*. He basically identifies the term with the meaning it holds within the domain of the political crime of high treason. As we will see, the political intrigue is just one of the meanings the term can take. In other words, Harding neither considers the semasiological nor the onomasiological levels of the term *conspiracy*. A sworn association against the public could be named in many ways other than as a *conspiracy*, and this term does not necessarily mean the same within the context of the political discourse than in the medieval statutes that gave birth to the offence of conspiracy. Yet, in some way, Harding was right in trying to draw some structural connection between the two. He was wrong in believing that the semantic structure of *conspiracy* was a hierarchical one in which the political sense was the hypernym, and the association to pervert justice a species of it. But, as we will see, there must be some structural, and possibly a genealogical relation, between the different meanings of *conspiracy* that explain the use of the term. Indeed, my thesis is going to be that they all probably derive, by conceptual operations such as metonymy/meronymy, from the same frame of organized or collective action.

1.4 Superseding Thesis

Holdsworth's *opus magnus* is an illustration of how subsequent historians came up with a synthesis of the different historiographical paths that had been taken in the history of the law of conspiracy.[180] In his synthesis, the relationship between medieval and modern conspiracy was

[180] Evaluating the works of Erle, Wright and Stephen, Dicey pointed out that he had "the impression that these eminent authors have each arrived at somewhat different conclusions, and that they each felt the law of conspiracy to be obscure," and that "it would be rash to express one's self with dogmatic confidence" regarding this topic. Thus, he cautiously expressed that by 1800 it was sure that "the law of conspiracy had… received under judicial decisions a

understood in terms of a continuity and expansion, as if the modern conspiracy had superseded the medieval one. He subscribed to Winfield's thesis that though there were some indications that conspiracy might have been a wrong before the Edwardian statutes, the substance was uncertain and it was not until the "statutes of Edward I's reign gave a writ of conspiracy that the offence definitely emerged."[181] He also maintained that though the definition of conspirators of 33-34 Edw 1 "covered a wide ground… most of the cases brought under the writ of conspiracy were cases of conspiracy to indict or appeal others for criminal offences."[182] By the time Holdsworth wrote, the existence of the Eyre's royal order of 1279 was already known, and he took notice of it, but he considered it no more than yet another instance of the pre-Edwardian vague references to conspiracy.[183] For that matter, he concluded that "we must therefore regard these statutes and the writ given by them as the starting point of the modern law on this subject."[184]

The above sentence almost seems a slip of the tongue[185]. One is inclined to think that he meant the starting point of the law of conspiracy without further qualification. But Holdsworth considered that "the Court of Star Chamber had enlarged the scope of the offence of conspiracy."[186] Furthermore, that Holdsworth saw such a continuity between the medieval and modern conspiracy as to consider the former the starting point of the latter is demonstrated through his belief that, in

---

very wide extension… [so that] a conspiracy.... included… a combination… for the purpose of committing a crime… for the purpose of violating a private right in which the public has sufficient interest… [and] for any purpose clearly opposed to received morality or to public policy" (Dicey, *Combination Laws*, 516-17). This was no general definition of conspiracy but rather a list of special conspiracies in the way of Stephen's, though the first one was coterminous with the law of attempt. Despite opinions to the contrary (Orth, *Combination and Conspiracy*, 41), it seems that he agreed with Wright's thesis as to the application of the common law conspiracy prior to 1825. The agreement with Wright is attested by his statement that "since a combination to commit a crime is ipso facto a conspiracy, it follows that a combination for any purpose made or declared criminal by the Combination Act…was in 1800 an undoubted conspiracy" (Dicey, Combination Laws, 517). It is also evidenced from his belief that judge's ideology rather than to the law invoked by them predicted the outcome of the law after 1825: "The Act, moreover, of 1825 had been interpreted by magistrates who were themselves individualists, and who, following the guidance of Parliament, used the law of conspiracy to check combinations which aimed at purposes in restraint of trade, and moreover to protect individual freedom of action. Hence, for fifty years, a conflict between the law, as expounded by the courts, and the habits and wishes of trade unionists," p. 529.

[181] 3 HEL 40.

[182] 3 HEL 403.

[183] 3 HEL 401-2.

[184] 3 HEL 402.

[185] Cf. 8 HEL 379: "the modern crime of conspiracy is almost entirely the result of the manner in which conspiracy was treated by the court of Star Chamber."

[186] 8 HEL 379.

the medieval conspiracy, "although the plaintiff could either indict the defendant for conspiracy or sue him for damages, the gist of the proceedings was not the damage which he had suffered, but the act of conspiracy."[187] In other words, it seems that Holdsworth considered the ground of the writ the conspiracy to falsely indict, not the false indictment.

Holdsworth understood the modern conspiracy as "springing from these two diverse yet connected roots" of the conspiracy in relation to the administration of justice and the developing law of attempts. Though by that time conspiracy was being dealt with by the Star Chamber, the classification of conspiracy as an offence against the administration of justice "was ceasing to have the meaning which it once possessed, because conspiracies which had no reference to false accusations were being punished by the Star Chamber."[188] Thus, in this court conspiracy came "to be regarded as a form of attempt to commit a wrong,"[189] and then "just as it punished all kinds of attempts to commit wrongful acts… it punished all kinds of conspiracies to commit the many varied offences punishable either by it or by the common law courts."[190]

In this passage, what Holdsworth says is closer to Wright's view that conspiracy was a sort of attempt, and that it derived its criminal liability from the criminality of the act conspired upon. Elsewhere, however, Holdsworth uses a different language that brings him closer to Stephen's wide rule. He contends that the court of Star Chamber "punished criminally not only conspiracies to abuse the process of the courts, but also conspiracies to commit any wrongful act."[191] Indeed, he goes on to say that the crime of conspiracy was committed "by an agreement to do an unlawful act, or to do a lawful act by unlawful means." This Denman's principle included "an act [which] may be sufficiently unlawful to render an agreement to do it a criminal conspiracy, though it cannot be brought under any of the recognized categories of the crime or tort". Though the principle had been settled after the Restoration, it "originates in the criminal equity administered by the Star

[187] 3 HEL 405, see also 406.

[188] 5 HEL 203-4.

[189] 5 HEL 204.

[190] 5 HEL 205.

[191] 8 HEL 379.

Chamber" and was based on the idea that "these acts were contrary to public policy, and therefore a conspiracy to effect them must be treated as a crime."[192]

In keeping with Stephen's thesis of the instrumental view of the law of conspiracy, Holdsworth admitted that the modern conspiracy is "an elastic doctrine… [that] gives the law a power of so developing its principles that they are kept in touch with the needs and ideas of the age." In that sense, it had been "used legitimately to strike at practices and courses of conduct which are contrary to the established principles of the common law, and are obviously dangerous to the state," but it could also "be used to give effect to the political prejudices of the judges."[193]

Thus, Holdsworth combined the attempt theory with the instrumental theory of the law of conspiracy[194]. Yet the background of these theories was the problem of the application of the law of conspiracy to trade unions. From that standpoint, it became even clearer that both views are incompatible. The conceptualization of conspiracy to the law of attempts left no space for judicial legislations, and limited its punishments to criminal conducts. That attempts to commit torts and acts that are not torts could be visited with punishments made nonsense. The criminality of such conducts, as Stephen and Wright rightly saw, depended on the element of cooperation. But this is a different concept than that of attempt: either aggravation of tortious conduct by cooperation, or aggregate action.

It is worth mentioning that though Holdsworth admits the instrumental character of the doctrine of conspiracy, he does not endorse any theory against judicial lawmaking. Or to be more precise, he seems to distinguish between legitimate and illegitimate lawmaking. The latter takes

---

[192] 8 HEL 381-3.

[193] 8 HEL 383.

[194] More recently, variations of the instrumental view of the wide rule include Orth, who traces back its application to trade unions to the early eighteenth century. As he rejects the attempt theory of conspiracy as an explanation of these cases, he omits the Star Chamber stage from his account and simply hints at an unexplained development from the medieval conspiracy to the idea that agreements to do something unlawful were conspiracies at common law (Orth, Combination and Conspiracy, 25-29). Even more audaciously, disregarding all received historiographical wisdom as "political," Macnair rejects the idea that a wide rule had ever existed in the Early Modern Period, and argues that "whatever its origins, by the late middle ages and early modern period 'conspiracy' had become indelibly associated in lawyers' mind with abuse of legal process and what is today called malicious prosecution". It was not until the *Journeymen Tailors* case of 1721 that judges "not only invented a doctrine of common law, as opposed to statutory, illegality of trade unions. They had also invented the notoriously protean and ill-defined general common law crime of conspiracy, going beyond its historical antecedents, which came to be used more or less explicitly to criminalise anything the judges disapproved of." Mike Macnair, "Free Association versus Juridification," *Critique* 39 (2011): 62, 64.

place when the judge gives voice to his own views, whereas the former is controlled by the policy principles enshrined in the common law. There is no better illustration of the former that his interpretation of the application of the law of conspiracy to trade unions. According to Holdsworth, there was a very old doctrine "of the common law that all persons ought to be allowed to carry their trades freely, subject only to any restrictions or regulations which might be imposed by the law."[195] Or, to put it in other words, the common law "aimed at… the removal of the danger of arbitrary restraints… on the freedom to dispose of one's capital and labour at one's will."[196] Thus, "it was inevitable that the courts should hold that combinations of masters which were entered into in order to force down wages or force up prices, or combinations of men which were entered into in order to force up wages or diminish the length of the working day, were indictable conspiracies." In this way, Holdsworth disagreed both with Wright's and Stephen's view that the doctrine restraint of trade was of very recent origin and that the law of conspiracy had never been applied to trade unions before the passing of the Act of 1825. His was a strange combination of arguments: on the one hand, he relied on the existence of the wider rule as the basis of the application of the law of conspiracy to trade unions, on the other hand, this application was grounded on the common law principle "of freedom of trade subject only to restraints imposed by law." [197] In other words, the purpose that these combinations pursued was already illegal at common law, and not just because legislation had been passed to forbid these combinations during the eighteenth century. He conceded, however, that after 1871 and 1875, "the Legislature had freed from criminal taint certain combinations to affect wages and other conditions of labour."[198]

[195] 11 HEL 477.

[196] 3 HEL 384. Dorothy George equally thought that the law of conspiracy as applied to trade unions "was based on the very old principle that combinations in restraint of trade were illegal, and there were, in fact, some very ancient precedents for it;" M. Dorothy George, *The Combination Laws Reconsidered*, Vol. 1 of *Economic History (A Supplement to the Economic Journal)*, edited by J. M. Keynes and D. H. Macgregor (London: Macmillan and Co., Limited), 222.

[197] 11 HEL 462.

[198] 11 HEL 482.

2. Conspiracy in the Middle Ages

2.1 Legislating the Corruption of Justice

The coming into being of the offence of conspiracy cannot be separated from the festering problem of judicial corruption that Edward I had inherited from Henry III (Sayles, Dissolution, 84-85). As for the seriousness of the problem, suffice to say as an illustration how a commission appointed after Edward I's absence between 1286 and 1289, revealed that a majority of the justices of the King's Bench and the Common Pleas had been involved in crimes, some of them as serious as tampering with evidence, forfeiting offices, forgery of documents, or even murder. It comes as no surprise that people at the time sang that "sunt justiciarii, quos favor et denarii alliciunt a jure."[199]

The genesis of the offence of conspiracy through the statutes 20 Edw 1, 28 Edw 1 c 10, and 33 Edw 1 is connected to contemporary legislation concerning this problem of judicial corruption. Not only were the terms used in these contemporary abuses also employed in the former statutes, but most importantly, the conceptual frame to which all of them refer to is the same.

2.1.1 Corruption of Royal Officers

The concept of a bribe—some form of payment or other reward that a judicial officer takes in exchange for some advantage he might give in any business in which this officer is involved—appears in the Statute of Westminster I 1275 (3 Edw 1 c 26). Namely, in this statute's preemptive measures that "no Sheriff, nor other the King's Officer, take any Reward to do his Office, but shall be paid of that which they take of the King."[200] Likewise, bailiffs of sheriffs have to swear that they will not fail to do right "for any love, hatred, fear, *reward, or promise*, and that they will conceal the secrets."[201] However, it seems that the most

[199] 2 HEL 294-7.

[200] "Qi nul Visconte ne autre Ministre le Roy ne prenge louer por fere son office mes seient paiez de ceo qil prengent del Rey." Hereafter, I will mention the original primary sources and their translation whenever it is relevant to show the language of the original, or when the translation does not follow closely the language of the original. Otherwise, I will mention the translation when available, and the original only when there is no translation.

[201] "Leaument presenterou[n]t/et que ceo pur nul amouyr ne pur nul hayne/ne doute/ne done/ne promes ne lerrount: que il les privites ne celerount," Britton, I, 9-9b. I will use Francis Morgan Nichols, ed. *Britton. An English Translation and Notes* (Washington: John Byrne & Co., 1901) for the translation, and *Britton* (London:

frequent form of bribery was an arrangement to have a share in the chose in action. In this sense, the statute provides that "No Officer of the King by themselves, nor by other, shall maintain Pleas, Suits, or Matters hanging in the King's Court, for Land, Tenements, or other Things, for to have part or profit thereof by Covenant made between them."[202] In this statute, we have three more elements: a pending plea from which it follows that one of the parties is bringing the officer, and a formal agreement to share in the thing. This agreement is the bribery or corruption itself. The unlawful conduct that the officer is expected to perform with regard to some legal business in order to benefit or advance the interests of the party bribing is referred to with the rather general and opaque term *maintain*. The same term appears in c 28 of the statute dealing with sheriffs and court clerks: "q[e] nul Clerk de Justice ne de Visconte ne meintege parties en quereles, ne bosoignes q[e] sont en la Court le Rey."[203] According to Britton, the articles of the inquest have to question juries "concerning sheriffs… that have *maintained* suits or the parties to actions, and have procured false inquests, whereby justice has been hindered."[204]

The agreement to have a share in the thing first appears under the term *champerty* in the Statute Westminster II 1285 (13 Edw 1 c 49), in the context of the great judicial scandal, which deals with the things in action that the high judiciary is not supposed to take as reward or bargain:

> THE Chancellor, Treasurer, Justices, nor any of the King's Council, no Clerk of the Chancery, nor of the Exchequer, nor of any Justice or other Officer, nor any of the King's House, Clerk ne Lay, shall not receive any Church, nor Advowson of a Church, Land, nor Tenement in Fee, by Gift, nor by Purchase, nor to Farm, nor by *Champerty*, nor otherwise, so long as the Thing is in Plea before Us, or before any of our Officers ; nor shall take no Reward thereof And he that doth {contrary to this Act} either

Printed at London in Flete streete by me Robert Redman dwellyng in saynt Dunstones paryshe at the signe of the George, 1540) for the original.

[202] "Nul Ministre le Rey ne mainteingne, par li ne par autre, le plez p[ar]oles ou bosoignes q[ue] sont en la Court le Rey, de teres tenements ou the autre chose, por aver part de ceo, ou autre p[ro]fit par covenant fet entre eaus."

[203] "no Clerk of any Justice, or Sheriff, {take Part} in any Quarrels {of} Matters depending in the King's court, nor shall work any Fraud, whereby common Right may be delayed or disturbed."

[204] "Et ausi de viscontes que eyent pris fyns et amerciaments de gentz de lour baillie que ilz ne sorent destreintz de estre chyuallers/et en ceo cas sou[n]t amerciables/ou que meintenent quereles et parties pledau[n]tz/et eyent procure fauz enquestes par quelle droiture fuit arrerie," Britton, I, 35a-35b.

himself, or by another, or make any {Bargain,} shall be punished at the King's Pleasure, as well he that purchaseth, as he that doth sell.[205]

Similarly, Britton makes the taking of choses in action an article of inquest:

Also concerning our officers who have maintained any wrong, or have accepted the presentment to any church, of which the advowson was in litigation in our Court, and let such be punished according to the statutes; or who have maintained any plea by champerty or in any other manner; and whether they have hindered justice in any point; and of the fees which they take, and of whom, secretly or openly (Nichols 1901, I, 37b).[206]

2.1.2 Corruption of Jurors

Another idea that is formulated in these statutes is the giving to and taking of bribes by jurors who are to perjure themselves returning verdicts. The term *conspiracy* was first used to refer to the corruption of jurors in the writ that was issued in 1279 by Edward I to his justices in Eyre, giving them the following instructions by which one more article was added to the Eyre of 1278:

Dominus Rex mandavit Iusticiariis suis itinerantibus in diversis comitatibus breve suum in hoc verba. Edwardus dei gratia etc. Iusticiariis suis itinerantibus in com' Kant' salutem. Quia datum est nobis intellegi quod quidam *maliciosi* homines de pluribus comitatibus regni nostri *propter incrementum utilitatis proprie* proniores *ad malum quam ad bonum* quasdam detestabiles *confederationes et malas cogitationes, prestitis mutuo sacramentis, ad amicorum et benivolorum suorum partes in placitis et loquelis ipsos contingentibus in comitatibus illis utpote in assisis, iuratis et recognitionibus fallaciter manutenendas et defendendas, et ad inimicos suos fraudulenter grauandos*, et in quantum in ipsis est plerumque exheredendos, inter se facere presumpserunt, et nos considerantes grauibus periculis et dampnis innumeris que tam nobis quam ceteris de regno nostro ex huiusmodi hominum malicia provenire possent, in futurum eorundem insolentiam congruis remediis reprimere volentes, vobis mandamus quod in singulis comitatibus in quibus vos itinerare contigerit ista vice de huiusmodi *confederatoribus* et *conspiratoribus* quanto diligentius poteritis inquiratur. Et si quos

[205] "Chaunceler, Tresorer ne Justice, ne nul de Consayl le Roy, ne Clerk de la Chauncelerye, del Escheker, ne de Justice, ne autre Ministre, ne nul del hostel le Roy Clerk ou lay, ne puisse receivre Eglise ne Avoeson de Eglise, ne tere ne tenement, [ne fee, ne par doun '] ne par achat ne a ferme, ne a chaumpart, ne en autre manere; taunt come la chose est en plee devaunt no[us] ou devant nul de noz Ministres, Ne nul loer [ne] seyt pris. E ki ceste chose face, ou par lui, ou par autry, ou nul [baret y face] seyt puni a la volente le Roi ausi bien celui q[e] le purchacera, com celui q[e] le fera."

[206] "Et ausi de nos ministres que ascun tort ount meytenu/ou ascun esglise ount receu: dount la vowson ad este debate en nostre court/et ceux soient punys solonc lestatute/ou que aueront meyntenu nul plee a champart/ou en autre manere/et si ilz eyent ascune droit desturbe en nul point/et de fees que ilz parnent/et de qui couertement ou apertement," Britton I, 37 b.

inde culpabiles inveneritis sine dilatione capi et in prisona nostra salvos custodiri faciatis, donec aliud inde preceperimus; et hoc nullatenus omittatis.[207]

The form of corruption this writ is trying to tackle is an agreement between jurors and possibly other parties (*utpote in assisis, iuratis et recognitionibus*) to support litigants in pleas (*partes in placitis et loquelis*), by perjuring themselves (*fallaciter)* in deception of court (*fraudulenter*) to disturb right (*in ipsis est plerumque exheredandos*) for some reward (*propter incrementum utilitatis proprie*).

This writ that was issued in 1279 would later become the model for the article of the eyre *De mutuis sacramentis* added to the chapters of the eyre since then as the *Novum capitulum per breve Regis*. The same article *De mutuis sacramentis* is sometimes annexed to the *Vetera Capitula*¸ and sometimes to the *Nova Capitula Itineris.*[208] The stereotyped versions added to each of these articles varied slightly. In the *Vetera Capitula*, inquest is to be made "of those by Oaths bind themselves to support or defend the Parties, Quarrels and Businesses of their Friends and well-wishers, whereby Truth and Justice are stifled."[209] In the *Nova Capitula*, it is to be made "of those who bind themselves by mutual Oaths, unjustly or justly to defend fraudulently Parts of Pleas or Suits affecting their Friends or Well-wishers, as in Assises, Juries, Recognizances, whereby they cannot be convicted in such Pleas or Suits according to the Truth."[210]

Compared to the language of the writ of 1279, in these versions of *De mutuis sacramentis*, there is no direct reference to bribes, although it is implied. By contrast, in Britton's paraphrase and extended version of the articles of the Eyre, corruption appears along with intimidation. In this rendition, corruption of jurors is of the essence of the offence:

---

[207] Helen M. Cam, *Studies in the Hundred Rolls: Some Aspects of Thirteenth Century Administration*, vol. 11 of *Oxford Studies in Social and Legal History*, edited by Paul Vinogradoff (Oxford: Oxford University Press, 1921), 58-59.

[208] Ib., 58.

[209] "de hiis qui sacramentis se astringunt ad partes vel loquelas {negocioru[m]} amicoru[m] benevoloru[m] sustinendas vel defendendas, per q[uo]d veritas et justici suffoca[n]tur," SR, I, 234.

[210] "Item de hiis qui mutuis sacrame[n]tis, injuste seu juste astringunt ad partes placito[rum] vel loquelaru[m], amicos vel benevolos tangent[er], fraudulent[er] sustinend[um] vel defendend[um], ut in Assisis, Juratis, Recognitionib[us], p[er] quod rei veritas in h[u]i[us] placitis vel loquelis inde no[n] possunt convinci, &c.," SR, I 238.

> Let it be also inquired concerning confederacies between the jurors and any of our officers, or between one neighbour and another, to the hinderance of justice; and what persons of the county procure themselves to be put upon inquests and juries, and who are ready to perjure themselves for hire or through fear of any one and let such persons.[211]

As this passage reveals, the corruption of juries could happen at a collective level as indicated in the articles of inquest or, perhaps more frequently, at the level of single jurors perjuring for hire (See for instance the petition of the abbot of Abingdon in Edward I, Roll 2 (1290) item 58). An illustration of how singled suborned jurors could operate appears in the description of the ground upon which jurors in the criminal procedure could be challenged:

> We will also, that if any man, who is indicted of a crime touching life and limb, and perceives that the verdict of the inquest, on which he has put himself, is likely to pass against him, desires to say that any one of the jurors is suborned to condemn him by the lord, of whom the accused holds his land, through greediness of the escheat, or for other cause by any one else, the Justices thereupon shall carefully examine the jurors, whether they have any reason to think that such slander is true. And often a strict examination is necessary; for in such case inquiry may be made, the jurors are informed of the truth of their verdict; when they will say, by one of their fellows, and he peradventure will say, that he heard it told for truth at the tavern or elsewhere by some ribald or other person unworthy of credit; or it may happen that he, or they, by whom the jurors have been informed, were intreated or suborned by the lords, or by the enemies of the person indicted, to get him condemned.[212]

The former passage also illustrates how jury corruption was inevitably linked to the corruption of the officers responsible for impaneling them. Thus, in addition to this inquiry about corrupt juries there should be inquiry "also concerning sheriffs, who… have maintained suits or the parties to actions, and have procured false inquests, whereby justice

[211] "Et ausi soit enquis de alloignaunte de iours par entre nos ministres et eux ou par entr[e] veisin et veisin en arrissement de droiture /et quex du counte se procure[n]t estre mys en enquestes et jorres/et queux se voilent parjurer pour lower/ou pour ascune doute de nuly," Britton I, 1, 38.

[212] Et volons que chescu[n] que soit encoupe de vie et de membre & se apperceyue que le verdict del enqueste ou il se au[r]a mys deyue passer encontre luy/et voille dire q[ue] ascun des iorours le est procure del dampner par son seigniour de qui il tie[n]t la terre par covetise del eschete our par autre: q[ue] les iustices sur ceo examinent les iorours ententiuement/si nul les eit fait ente[n]dre tiel eslaundre estre verite/et souent ad mester bon examineme[n]t/car en tiel cas lenquerer coment les iorours seuent la verite de lour verdict/ou ilz dirrount par ascu[n] de la compaynye/cely perauenture dirra que il le countent pur verite a la tauerne/ou ailiours de ascun ribaud ou autre/a q[ue] home ne doit rien crere/ou p[er]auenture cely ou ceux par quer les iorors serrount ensenses:auerount estr[e] pries ou procures p[er] les seigniours/ou par les enemies al endite pur lyu dampner" Britton, I, 13.

has been hindered."[213] Thus, the packing of juries was one of the malfeasances to which the term *maintenance* could refer to when linked to the sheriffs.

Sometimes the corruption of criminal juries took the form of criminal enterprises. In 1249, we are told that people from Winchester who robbed foreign merchants:

> have craftly entered into a conspiracy amongst themselves, that no one of them shall, on any account, accuse another; and thus their conspiracy and cunning has escaped the knowledge of you [the king]… [and with] those persons, too, whom he [the justiciary] had appointed as inquisitors, were confederates and abettors of robbers… [and with] some whom the king had deputed, as guardians and bailiffs, to protect that part of the country, and to apprehend or drive away robbers… [and with] some even who were superintendents of the king's household, and crossbow-men in his service."[214]

In this case, a series of agreements had been used to protect and guard off criminals from criminal justice. Firstly, these people involved in criminal activity promised each other not to become approvers of the others in the event of being caught. Secondly, these people had also agreed with the juries of presentment so that their crimes would not be reported to the king's justices. Finally, there was agreement between the criminals and the king's officers in the county so that they would not arrest and imprison them. It should be said that it follows from Matthew Paris's account that there was an economic side to these agreements in that all who supported the robbers benefited from the robberies perpetrated against the merchants. Though it is not explicitly mentioned, it is probable that as part of these agreements jurors and royal officers received bribes or, most probably, a part of the stolen goods as theftbote.

2.1.3 Barratry and Corruption

I use *barratry* here in the sense of moving or instigating of false actions. There is an explicit reference to them in the Statute Westminster I 1275 (33 Edw 1 c 33), which states that "no Sheriff shall suffer any Barretors {or Maintainers of} Quarrels in their Shires, neither Stewards of great Lords, nor other unless he be Attorney for his Lord, to make Suit, {nor} to

[213] "Et ausi de viscontes que eyent pris fyns et amerciaments de gentz de lour baillie que ilz ne sorent destreintz de estre chyuallers/et en ceo cas sou[n]t amerciables/ou que meintenent quereles et parties pledau[n]tz/et eyent procure fauz enquestes par quel droiture fuit arrerie," Britton I, 35a-35b.

[214] Matthew Paris, *English History,* trans. J. A. Giles, vol. 2 (London: Henry G. Bohn, York Street, Covent Gardent, 1853 [1250-1255]), 295, 297.

give judgments in the Counties nor to pronounce the judgments."[215] This clause regarding the possibility of false judgment shows the other side of barratry. As such, this conduct goes hand in hand with judicial corruption, particularly with that form of corruption which is the sharing in the spoils of the false suit. So, for instance, the Statute Westminster II 1285 (13 Edw 1 c 36) refers to the incitation of false suits by the holders of local courts so that they can give false judgments to obtain fines:

> FORASMUCH as Lords of Courts, and other that keep Courts, and Stewards, intending to grieve [their Inferiors,] where they have no lawful mean so to do, procure other to move Matters against them, and to put in Surety and [other] Pledges, or to purchase Writs, and at the Suit of such Plaintiffs compel them to follow the County, Hundred, [Wapentake,] and other like Courts, until they have made Fine with them at their will.[216]

Likewise, if the barrator is to be successful in his enterprise he has to secure the collaboration of royal officers that will accept their false actions, or arrange favorable panels, etc. So, for instance, the Mirror tells us that perjury is committed by "those officers of the king who knowingly maintain false actions, false appeals, or false defences."[217] Or, he would have to make sure that the false action would be pleaded in court for which we are told that the pleader was "bound by oath that he will not knowingly maintain or defend wrong or falsehood, but will abandon his client immediately that he perceives his wrongdoing."[218] Or, in the case of civil pleas, it is probable that he would arrange the forgery of evidence to use in court. Thus, the abovementioned Statute of Westminster I c 28 abovementioned in addition to forbidding court clerks and sheriffs from maintaining parties with business in court, it also

---

[215] "q[e] nul Visconte ne seoffre baretour meintenir pa[r]oles en Conte; ne Seneschaus de g[ra]nt Seygnurs, ne autre sil ne seit attorne son Seygnur a suite fere ne render les Jugemen[t]s des Contez ne ponu[n]cier les Jugemen[t]s, sil ne seit especialment prie."

[216] "Et quia d[omi]ni cur[tis] & alii qui cur[tis] tenent & senescalli, volentes gravare subditos suos cum non h[ab]eant legalem viam eos gravandi, procurant alios movere querelas versus eos & dare vad[ios] & offerre pleg[ios], vel impet[ra]re br[ev]ia & ad sectas huj[us]modi querenciu[m] compellunt eos sequi Com[itatum] Hundr[edum] & Cur[tis] quousq[ue] finem fec[er]int cum ip[s]is p[er] voluntate vua."

[217] "Tuz ceux ministres le Eei qe meintenent faus actions fausses appealx ou faus defenses a escient," Mirror, bk 1, c 5.

[218] "Chargeable par serement qil ne meintendra ne defendra tort ne faussine a soun escient, einz guerpera son client quel oure qil puisse soun tort apercevoir," ib.

provides that they shall not "work any Fraud, whereby common Right may be delayed or disturbed."[219]

I use here the concept of moving or instigating false actions in a broad sense, so as to include those who bring or encourage false accusations. At the time, these statutes were being passed, accusations were initiated either by appeal or by presentment by a jury, which by that time could already be based on a bill of complaint brought or drafted privately at court. The Statute Westminster II c 12 takes notice of the instigation of false appeals:

> FORASMUCH as many, through Malice intending to grieve other, do procure false Appeals to be made of Homicides and other Felonies by Appellors, having nothing to satisfy the King for their false Appeal, nor to the Parties appealed for their Damages, It is ordained, That when any, being appealed of Felony surmised upon him, doth acquit himself in the King s Court in due Manner, either at the Suit of the Appellor, or of our Lord the King, the Justices, before whom the Appeal shall be heard and determined, shall punish the Appellor by a Year's Imprisonment, and the Appellors shall nevertheless restore to the Parties appealed their Damages, according to the Discretion of the Justices, having respect to the Imprisonment or Arrestment that the Party appealed hath sustained by reason of such Appeals, and to the Infamy that they have incurred by the Imprisonment or otherwise, and shall nevertheless make a grievous Fine unto the King. And if peradventure such Appellor be not able to recompense the Damages, it' shall be inquired by whose Abetment or Malice the Appeal was commenced, if the Party appealed desire it; and if it be found by the same Inquest, that any Man is Abettor through Malice, at the Suit of the Party appealed he shall be distrained by a judicial Writ to come before the Justices.[220]

As for the jurors moving false accusations, the infamous *Company of the Pouch* offers a good example of their *modus operandi*. In this case the sheriff had entered into a confederacy with jurors he later impaneled to "indict persons, and the other save them, for

---

[219] "Ne fraude ne face par co[m]mune dreiture delaer ou destorbie."

[220] "Quia multi p[er] maliciam volentes alios gravare p[ro]curant falsa appella fieri, de homicidio & allis feloniis, p[er] appellatores nichil h[ab]entes unde D[omi]no Regi p[er] falso appello nec appellatis de dampnis respondere possunt; Statutu[m] est q[uo]d cum *[ali…]* sic appellatus de felonia sibi impo[s]ita se acquietav[eri]t in curia Regis modo debito, vel ad sectam appellatoris vel D[omi]ni Regis, Justic[iarii], coram quib[us] auditum erit huj[us]modi appellu[m] & t[er]minatum, puniant appellatorem p[er] prisonam unius *[- -]* & n'omin[us] restituant hujusmodi appellatores appellatis dampna sc[un]d[u]m discrec[i]om Justic[iarii], h[ab]ito respectu ad prisonam vel arrestac[i]o[en]m, quam occ[asi]one huj[us]modi appello[rum] sustinuerunt appellati, & ad infamiam, quam p[er] imp[ri]sonamentum vel allo modo incurrerunt, & n'omin9 versus D[omi]n[u]m Regem gravius redimant[ur]. Et si forte hujusmodi appellatores non h[ab]eant unde pred[i]c[t]a dampna restituere possint, inquirat[ur] p[er] quo[rum] abettum formatum fit huj[us]modi appellum p[er] maliciam, si appellatus hoc petat, et si inveniatur p[er] illam inquisic[i]o[ne]m q[uo]d aliquis sit abettator p[er] maliciam, p[er] breve de judicio ad sectam appellati, distringatur ad veniendu[m] coram Justic[iarii]."

bribes."[221] That is, there was an agreement between the jurors and the sheriff to accuse falsely to extort money from their victims. Also, we are told by the Mirror of Justices that after dozens have received presentments from the four villages, "they are bound to accuse conspirators who have unlawfully procured that a guilty person shall be saved, or that an innocent person shall be indicted at such inquests."[222]

2.1.4 The Ordinance of Conspirators

The next step in the tackling of judicial corruption was the so-called Statute of Conspirators 1293 (20-21 Edw I):

> WHERE it is contained in our Statute that none of our Court shall take any Plea to Champerty by Craft nor by Engine; and {that no} Pleaders, Apprentices, Attornies, Stewards of Great Men, Bailiffs, {nor any} other of the Realm, {shall take for Maintenance or the like Bargain, any manner of Suit or Plea against other,} whereby all the Realm is much grieved, and both Rich and Poor troubled in divers manners; It is Provided by a common Accord, That all such as from henceforth shall be attainted of such Emprises, Suits, or Bargains, and such as consent thereunto, shall have Imprisonment of Three Years, and shall make Fine at the King's Pleasure
>
> Our Lord the King, at the Information of Gilbert Rowbery Clerk of his Council, hath commanded, That whosoever will complain himself of Conspirators, Inventors and Maintainors of false Quarrels, {and Partakers thereof,} and Brokers of Debates, that {Gilbert Thornton shall cause them to be attached by his Writ, that they be before our Sovereign Lord the King, to answer unto the Plantifs by this Writ following:}
>
> The King to the Sheriff Greeting, We command thee, That if A. of B. give thee Surety for prosecuting his Claim, then put by Gages and safe Pledges G of C that he be before us from the Day of the Holy Trinity in Fifteen Days, wherever We shall then be in England, to answer to the aforesaid A. of a Plea of Conspiracy and Trespass according to our Ordinance lately thereof provided, as the said A. can reasonably show that he ought to answer to him thereof. And have there the Names of the Pledges and this Writ. Witness G. de Thornton.
>
> And if any Man shall be convicted at the Suit of any Complainant of any such Offence, let him be imprisoned until he hath satisfied the Party grieved, and towards the King let him be grievously redeemed.[223]

---

[221] Nichols, *Britton*, 79, n (1).

[222] "Sunt il charchables dencuser les conspiratours qi eient procure desavoer ' ascun peccheour ou denditer innocent en teles enquestes," Mirror, bk 1, c 13.

[223] CUM [con]tenu seit en n[ostr]e estatut ke nul de n[ostr]e Curt enprenge play a champart, ne par art ne par engin, {Cunteurs ne atturnez ne aprentifs, seneschaus des hautz homes baillifs ne autres de la [ter]re nenprengent a champart ne par autres barettours de'} tute manere de play, {ou} tute manere de gent, parunt tote la [ter]re est greve, riches & poures sunt travaillez en mutz de maneres: Purveu est par [com]mun acord ke tuz ceus ke

The Statutes of the Realm list this as a statute of uncertain date. The uncertainty of the date derives from the uncertainty of its structure as there is evidence suggesting that it might be a concoction of two different laws. According to the commissioners, all English editions printed this as a single statute, but under the name of Statute of Champerty. There are some old printed copies, however, that divide the statute in two different parts enacted at separate dates. The first part corresponded to the Statutum of Champerty, dated either in 11 Edw 1 or 20 Edw 1. The second part was the Statutum de Conspirators, dated either in 33 Edw 1 or of unknown date. It follows from these editions that it is possible that other editions simply consolidated these two into one single statute. On consideration of internal and external evidence, Winfield inconclusively narrows down the dates to either 20 Edw 1 or 21 Edw 1 for the first part, and believes that the second part was most likely passed in 21 Edw 1.[224]

As part of the evidence that the second part was probably passed in 21 Edw 1, Winfield points out that this second part of the Statute of Conspirators bears a "strong family resemblance" to the Ordinance of Conspirators 1293, particularly in that the latter seems to foreshadow the writ that the Statute of Conspirators fleshes out. Moreover, the writ is to be crafted against a recent ordinance:

Statute of Conspirators	Ordinance of Conspirators
Our Lord the King, at the Information of Gilbert Rowbery Clerk of his Council, hath commanded, That **whosoever will**	Concerning **those who wish to make complaint about conspirators arranging for pleas to be initiated**

desoremes sunt atteintz de celes enprises {suten e Bargayngnurs,} e ceus ke a cele chose assentent eyent la prison de trois annz, e ne purkaunt scient reintz a la volunte le Rey.

D[omi]n[u]s Rex mandavit nunciante Gilb[er]to de Roubires cl[er]ico de [con]silio d[omi]n[i] Reg[is], q[ou]d quicumq[ue], volu[er]it se [com]q[ue]ri de [con]spiratorib[us] f[als]a[rum] q[ue]rela[rum] sust[e]ntatorib[us], inventorib[us] , & manutenentib[us] querela[rum] f[als]a[rum], ut inde p[ar]tem h[ab]eant & [con]troversa[rum] bargainatorib[us] {q[oud], Gilb[er]t[us] de Thorton p[er] b[r]e[ve] fa[ciat] eos attachiari q[oud] sint cor[am] d[omi]n[o] Rege [con]querentib[us] respondere p[er] hoc b[rev]e}. Rex Vi Vic[ecomes] sal[u]t[e]m ; Precipimus t[ibi] q[uo]d si A. de B. fec[er]it te secu[rum] de clam[orem] suo p[ro]s[equendo], tunc pone p[er] vad[ios] & salvos pleg[ios] G. de C. q[uod], sit coram nobis a die S[an]c[tisim]e T[ri]nitatis in xv. dies, ubicumq[ue] tu[n]c fu[er]im[us] in Angl[iae], ad respondend[um] p[rae]fa[c]to A. de pl[ac]ito [con]spiracionis & transgressionis s[e]c[um]d[u]m ordinac[i]o[n]em n[ost]ram nup[er] inde p[ro]visam, sicut idem A. rac[i]onabilit[er] monstrare pot[er]it q[uo]d ei inde respondere debeat. Et heas ibi no[m]i[n]a plegio[rum] & hoc br[ev]e. T. G. de Thornton, &c.

[224] Winfield, *Conspiracy*, 22-28. Cf. Bryan, *Conspiracy*, 9, 11; 3 HEL 400. See also the note to the Statute of Conspirators in the Statutes of the Realm.

complain himself of Conspirators, (1) Inventors and Maintainors of false Quarrels, [and Partakers thereof,] and Brokers of Debates, that [Gilbert Thornton shall cause them to be attached by his Writ, that they be before our Sovereign Lord the King, to answer unto the Plantifs by this Writ following:] The King to the Sheriff Greeting, We command thee, That if A. of B. give thee Surety for prosecuting his Claim, then put by Gages and safe Pledges G of C that he be before us from the Day of the Holy Trinity in Fifteen Days, wherever We shall then be in England, to answer to the aforesaid A. of a Plea of **Conspiracy and Trespass according to our Ordinance lately thereof provided**, as the said A. can reasonably show that he ought to answer to him thereof. And have there the Names of the Pledges and this Writ. Witness G. de Thornton.	**maliciously in the country, as brewers of discord, maliciously maintaining and sustaining those pleas and disputes at champerty or so that they might have some other advantage from it,** they are to come henceforth before the justices appointed to the lord king's pleas, and there they are to find security that they will prosecute their complaint. **And the sheriffs are to be ordered by a writ of the chief justice and under his seal, that they are to be attached to appear** before the king on a certain day: and swift justice is to be done there. And those who are convicted of this are to be severely punished, in accordance with the discretion of the aforesaid justices, by prison and ransom; or such complainants are to wait for the eyre of the justices in their parts if they wish, and sue there etc.[225]

The connection between this Ordinance, and the Statute of Conspirators becomes even more plausible in consideration of a royal mandate not mentioned by Winfield and enrolled in 1293, the very same year that the Ordinance was passed, and which bears a closer

[225] "De illis qui conqueri voluerint de conspiratoribus in patria placita maliciose moveri procurantibus, ut contumelie braciatoribus placita illa et contumelias, ut campipartem vel aliquod aliud comodum inde habeant {maliciose} manutenentibus et sustinentibus, veniant decetero coram justiciariis ad placita domini regis assignatis, et ibi inveniant securitatem de querela sua prosequenda. Et mandetur vicecomitibus per breve capitalis justiciarii et sub sigillo suo quod attachientur quod sint coram rege ad certum diem, et fiat ibi celeris justicia. Et illi, qui de hoc convicti fuerint, puniantur graviter juxta discrecionem justiciariorum predictorum{per prisonam et redempcionem}; aut expectent tales querentes iter justiciariorum in partibus suis si voluerint, et ibidem sequantur etc." Paul Brand, ed.,"Edward I: Parliament of 1306, Text and Translation," in *The Parliament Rolls of Medieval England*, ed. C. Given-Wilson et al., CD-ROM (Scholarly Digital Editions: Leicester, 2005), item 96.

resemblance to the first part of the second part of the Statute of Conspirators in the Statutes of the Realm:

Statute of Conspirators	Royal mandate
Our Lord the King, at the Information of Gilbert Rowbery Clerk of his Council, hath commanded, That whosoever will complain himself of Conspirators, (1) Inventors and Maintainors of false Quarrels, [and Partakers thereof,] and Brokers of Debates, that [Gilbert Thornton shall cause them to be attached by his Writ, that they be before our Sovereign Lord the King, to answer unto the Plantifs by this Writ following:]	Dominus rex mandavit, nunciante Gilberto de Rouburs clerico de consilio, quod quicumque voluerit se conqueri de conspiratoribus, falsarum querelarum sustentatoribus et inventoribus, manucaptoribus et sustentatoribus falsarum querelarum ut inde partem habeant et controversiarum braciatoribus, quod Gilbertus de Thornton' per breve suum faciat eos attachiari quod veniant coram rege inde querentibus responsuri.[226]

Thus, all seems to suggest that the second part of the Statute of Conspirators was a concoction of the Ordinance of Conspirators of 1293, and that the writ that was ordered to be framed that same year was provided in fulfillment of the provision of that ordinance that complainants should have remedy by writ against conspirators. Indeed, one may ask whether the Statute was ever legislated. Sayles points out that the Statute of Conspirators does not correspond to any statutory record, but rather to private collection, and that there is no record case in which the punishment provided by was ever enforced.

This is where we come to the conceptual problem, since most commentators seem to think that the second part of the statute is conceptually detached from the first part. This in turn directly relates to our frame approach.

Though Winfield remains on the fence with regard to the problem as to whether this is one or two different statutes, he seems to agree with the idea that internally it has two parts as "it concerns itself in its first part mainly with champertors, and in its second part chiefly with conspirators and maintainers," and that "the preamble refers to a statute prohibiting champerty on the part of the members of the King's court and maintenance on the part of

[226] Paul Brand, ed., "Edward I: Parliament of 1306, Appendix: Additional Information and Related Material for Roll 6, Text and Translation," in *The Parliament Rolls of Medieval England*, ed. C. Given-Wilson et al., item 96. CD-ROM (Scholarly Digital Editions: Leicester, 2005).

anybody else."[227] This is true for the translation, but if we turn to the original it is no longer defensible:

Translation	Original
WHERE it is contained in our Statute that **none of our Court shall take any Plea to Champerty** by Craft nor by Engine; and {that no} Pleaders, Apprentices, Attornies, Stewards of Great Men, Bailiffs, **{nor any} other of the Realm, {shall take for Maintenance or the like Bargain, any manner of Suit or Plea against other,'**} whereby all the Realm is much grieved, and both Rich and Poor troubled in divers manners; It is Provided by a common Accord, That all such as from henceforth shall be attainted of such Emprises, Suits, or Bargains, and such as consent thereunto, shall have Imprisonment of Three Years, and shall make Fine at the King's Pleasure Our Lord the King, at the Information of Gilbert Rowbery Clerk of his Council, hath commanded, That whosoever will complain himself of Conspirators, (1) Inventors and Maintainors of false Quarrels, [and Partakers thereof,] and Brokers of Debates, that [Gilbert Thornton shall cause them to be attached by his Writ, that they be before our Sovereign Lord the King, to answer unto the Plantifs by this Writ following:]	CUM [con]tenu seit en n[ostr]e estatut ke **nul de n[ostr]e Curt enprenge play a champart,** ne par art ne par engin, [Cunteurs ne atturnez ne aprentifs, seneschaus des hautz homes baillifs **ne autres de la [ter]re nenprengent a champart ne par autres barettours de'] tute manere de play,** [ou'] tute manere de gent, parunt tote la [ter]re est greve, riches & poures sunt travaillez en mutz de maneres: Purveu est par [com]mun acord ke tuz ceus ke desoremes sunt atteintz de celes enprises [suten e Bargayngnurs,] e ceus ke a cele chose assentent eyent la prison de trois annz, e ne purkaunt scient reintz a la volunte le Rey. [Done a Berewyk sur Twede Ian du regne le Rey Edward, fiz le Rey Henr[i], vintime.]

Perhaps the most important point here is what Winfield is presupposing and/or implying: that champerty, maintenance, and conspiracy are independent offences. But the very tenor of the first part of the statute relates both concepts of maintenance and champerty ("none of our court shall take any Plea to Champerty"). Winfield seems to ground his argument in that prior statutes referring to the taking of bribes are always in relation to royal

[227] Winfield, *Conspiracy*, 24.

officers (3 Edw 1 c 25, c 26, c 49), but the first of these statutes prohibits that they "shall maintain Pleas, Suits, or Matters hanging in the King's Court, for Land, Tenements, or other Things, for to have part or profit thereof by Covenant made between them," and 3 Edw 1 c 28 forbids that "Clerk of any Justice, or sheriff {take part}in any Quarrels {of} Matters depending in the King's court."

It is true that the first part of the Statute of Conspirators is related to 3 Edw 1 c 25, c 26, c 33, and 13 Edw 1 c 49, but this is because they are all an expression of the same conceptual frame of judicial corruption. The prototypical description of that frame is that of someone who enters in an agreement with an officer that he would support someone else bringing false suit in land for profit, usually a share of the land. Obviously, though it is not specified here, maintaining a false plea in a royal court involves returning false verdicts, which in turn involves corrupting the juries directly or through the sheriff or other officers. Similarly, maintaining a plea in a local court involved giving false judgement, which in turn involved interfering with the court suitors. Words like *conspirators* refer to this agreement, whereas words like *craft, engine,* or *inventors* refer to the purpose of the agreement to deceive justice usually by devising false actions (and this includes the forgery of false evidence); *champerty* and *partakers* refer to the promise that there will be a profit for the parties involved in the agreement; *brokers of debates, brewers of discord,* and *controversarium braciatoribus* refer to the people bringing or inciting the false suit, the barrators. *Maintenance* refers to the misdeeds of corrupt officers, juries, lawyers to uphold the false suit.

The connection with the frame first expressed in the articles of the Eyre becomes more apparent if we consider that it seems that the purpose of the Statute of Conspirators was to provide a remedy by writ out of the King's Bench.[228] Such a remedy would be speedier than waiting for the next Eyre for those who aggrieved to report about these people who had entered such agreements. Indeed, if we accept that the Statute of Conspirators refers to the writ provided by the Ordinance of Conspirators, the latter not only offered this writ before

[228] The Statute of Conspirators says that Gilbert Thornton, who was CJKB shall "cause them to be attached by his writ." The ordinance that those complaining of conspirators "are to come henceforth before the justices appointed to the lord king's pleas…and the sheriffs are to be ordered by a writ of the chief justice and under his seal, that that they are to be attached." Sayle argues that, at least during the reign of Edward I, this was a judicial writ and not an original one out of chancery. For his attempt to explain the *Articuli Super Chartas* and other contemporary references to this as a writ out of chancery see 58 SS lx.

the King's Bench for "those who wish to make complaint about conspirators…" but also allowed such complainants "to wait for the eyre of the justices in their parts if they wish, and sue there, etc." This probably referred to the new bill procedure, by which the juries of presentment would learn about offences which they would later present in response to the articles of the eyre. Both the need to tackle the problem of corruption in a speedier way and the consequent application of the new bill procedure appear in the next relevant statute, Articuli Super Cartas 1300, 28 Edw 1 c11:

> IN Right of Conspirators, false Informers, and evil Procurers of Dozens, Assises, lnquests and Juries, the King hath provided Remedy for the Plaintiffs by a Writ out of the Chancery; and notwithstanding, he willeth that his Justices of the one Bench and of the other, and Justices assigned to take Assises, when they come into the Country to do their Office, shall upon every Plaint made unto them, award Inquests thereupon without Writ, and shall do right unto the Plaintiffs without Delay[229].

Thus, in conformity with the logic of providing speedier and more effective justice against conspirators, this statue widens the range of remedies by allowing bills of complaint of such a wrong to be brought before the itinerant justices. In other words, it gives jurisdiction to these itinerant justices over conspirators. Thus, we have the full spectrum of possibilities to deal with this evil: the eyre, the King's Bench, and the itinerant justices of assizes, gaol delivery, and oyer and terminer.

It should be mentioned that though the Statute of Conspirators refers to *maintenance* in a general way in relation to barrators, it refers to barrators (*false informers*) as embracers (evil procurers) of both civil and criminal juries (*Dozens, Assises, Inquests, and Juries)*. In other words, of necessity barratry included what would later be called embracery, including bribing the sheriff to pack a jury with friends, bribing the juries directly, or perhaps laboring or intimidating them. The juries who would perjure themselves as a consequence of the embracery would *maintain* the false pleas or accusation.

[229] "En droit des Conspiratours, faus enfourmours, & mauveis p[ro]cureours des duzeines, enquestes, assises, & jurees, le Roi ad ordene remedie as pleintifs par bref de Chancelerie; & ja dumeins voet, q[e] ses Justices de Iun banc& de lautre, & Justices as assises prendre assignes, q[ua]nt il viegnent en pais a fere leur office, de ceo facent leur enquestes a chescuny pleinte, santz bref, & santz delai, & facent droit as pleintifs."

From this point of view, it becomes apparent that the next chapter of the Articuli Super Cartas (c 11) does not only refer to corruption of royal officers by champerty but it is also connected to the one mentioned above:

> none of his Ministers shall take no Plea [for Maintenance,] by which Statute [other Officers] were not bounden before this time; the King will, that no Officer nor any other, for to have part of the Thing in Plea, shall not take upon him the Business that as in Suit; nor none upon any such Covenant shall give up his Right to another."[230]

In this statute, we have reference to agreements between royal ministers to support pleas to have a share in the thing. The word used to refer to such agreement is covenant rather than conspiracy.

2.2 The Writ of Conspiracy in Action

Perhaps the best way to illustrate the way in which the concepts involved in these statutes are interrelated within the frame that would be known as conspiracy is through the inspection of some cases that either by writ or petition flowed to the royal courts during these years. Regarding those cases, I will distinguish between those concerning corruption and barratry in civil actions and those in criminal proceedings. Firstly, because judging from the letter of these statutes, particularly the Articles of the Eyre and the Statute of Conspirators, it seems that agreements concerning civil suits fell more naturally within their scopes than agreements concerning criminal proceedings. In fact, the latter was closer to the statute 13 Edw 1 c 12. Secondly, from a substantive point of view, corruption and barratry in civil actions are normally moved by economic incentives, whereas in criminal proceedings, though this economic incentive is not altogether absent, most of the time they are moved by personal grudges. Thirdly, conceptually speaking, most of the cases concerning civil proceedings have to do with the disturbance of rights, whereas the cases concerning criminal proceedings have to do with wronging people. Indeed, this distinction may have something to do with the fact that during its early state, this was always referred to as a writ of conspiracy and trespass.

[230] "nul de ses Ministres ne preist nul plai a champart, & p[er] cel estatut autres q[e] Ministres ne estoient pas avant ces houres a ceo lieez, voet le Roi, q[e] nul Ministre, ne nul autre, pur part aver de chose q[e] est en plai, enpreigne les busoignes q[e] sont en plai; Ne nul sur tieu covenant soen droit ne lease a autri."

2.2.1 Disturbance of Right by Judicial Corruption and Barratry

Following the letter of the Articles of the Eyre, and the Statute of Conspirators, subsequent cases of corruption and barratry were framed as agreements in support of parties to pleas for profit. We will first look at the cases of corruption by litigants concerning pending litigation, and later move to barratry, which often involved the corruption of jurors and judicial officials, as well as judicial fraud.

As for the corruption of jurors, an early case shows us jurors changing their verdicts for profit. In 1293, an action of conspiracy was brought against assize jurors before the King's Bench alleging that the plaintiff had successfully sued an assize of novel disseisin against certain prior, and that after that, the latter complained against the judge in that case before the *auditores querelarum*, leading to a reexamination of the jurors and a judgment for the prior. The plaintiff complained that the jurors "have procured and abetted the prior to have them come before the auditors and promised that they would deny their verdict a let him have the land back in return for various gifts."[231] So, rather than being procured by somebody else, the jurors were involved in barratry, encouraging one of the parties to bring a new false suit. Single jurors were also up for hire, ready to influence the other members of the jury. In a petition to the king made in 1290, we learn of a certain juror who was removed in the Eyre of Berkshire for conspiracy, but who nevertheless was reinstated by a corrupt judge who had been promised a church in a writ of right for the advowson of that church by the plaintiff, and who promised the corrupt juror fifteen acres of land.[232] Jurors were not only corrupted to give false verdicts, but also to make false assessments. In the case of *William Hardegrey v. Alan Altman and others* (1294) 58 SS 197, pl 103, it was alleged that in a previous case concerning the seizure of cattle, the plaintiff "by the conspiracy and confederacy which he made between them in this matter with the aforesaid John Amy and the others, who were the jurors of the aforesaid inquisition at the taking of the aforesaid inquisition, prevailed so much upon the aforesaid jurors that they taxed… [the plaintiff's] damages by reason of the

[231] Paul Brand, ed.,"Edward I: Parliament of 1302, Appendix: Original Petitions and Related Material for Roll 2, Text and Translation," in *The Parliament Rolls of Medieval England*, ed. C. Given-Wilson et al., item 96. CD-ROM (Scholarly Digital Editions: Leicester, 2005).

[232] Paul Brand, ed.,"Edward I: Parliament of 1302, Text and Translation," in *The Parliament Rolls of Medieval England*, ed. C. Given-Wilson et al., item 96. CD-ROM (Scholarly Digital Editions: Leicester, 2005), item 58.

aforesaid plea at ten pounds". After the defendant paid part of that excessive assessment, the money was "shared among the aforesaid jurors by reason of the aforesaid assessment."

Corruption by local officers as an agreement to support a party for profit was also framed as conspiracy. We know for instance, of a petition of the Londoners to the king complaining that justice was never done to complainants because city clerks and officials were involved in "conspiracies and machinations" and were being retained by those about whom complaints were made.[233] Thus, rather than a bribe, corruption in this case took the form of a more permanent relationship between master and client, which was based on a fee or annuity or the expectation of future benefits on the part of the latter from the former.

However, most cases of corruption involved the bringing or inciting of false pleas. In *Gerald vs Ralph* (1293) 57 SS 168 pl 73, we have a case of barratry and corruption of jury. The defendant was accused of having arranged with two others that one of them was to bring a writ of novel disseisin against certain manor "by his conspiracy and for ten marks… and also in order to have champarty [sic] of the aforesaid manor if perchance he had been able to establish his right.". Furthermore, they also "falsely and maliciously fabricated with regard to this a certain verdict and arranged for it to be presented and recited by the jurors of that assize before the justices etc., before whom the assize was taken," which the jurors presented as a verdict.

The case of the parson of Souldern reveals how it was the legal counselor who most prototypically would incur in barratry as he had the legal knowledge to defend parties regardless of the merits,[234] to incite others to bring false actions, and to arrange false verdicts and false evidence for profit. The parson was accused of having hindered the prosecution of a plea "by his conspiracy and the confederation between himself and the opposite party and likewise the jurors of the country". He was also accused of having prevented the collection of a feudal service "by his conspiracy," and also of having "advised her to bring a certain assize of mort d'ancestor against them for the manor of Souldern with appurtenances, especially as he would have champart thereof if she could have proved her right to it." By

[233] Ib.

[234] See the oath of the pleader, Mirror, Bk 2 c 5.

his conspiracy he also advised other person "to implead… [the plaintiffs] before the justices of the bench with regard to thirty marks, promising him an inquisition of the country to suit his wishes if it should in any way happen that they were impleaded as far as an inquisition, and this {he did} especially that he might have champart [sic] thereof." He also "procured and advised etc. [another]… to bring a certain assize of novel disseisin against… [the defendants] with regard to a hundred acres of land etc. in Souldern, and he maintained that plea at his own expense etc." Likewise, in another action of novel dissessin "by his conspiracy etc. procured… [some] jurors of the aforesaid assize and also maintained that plea."[235] Among other things, the parson defended his privileged position as "it is lawful for everyone of the realm to help his friends in their rights in the lord king's court etc. or to advise etc. against their enemies."[236]

Sometimes the barratry was just a means by defeated parties in previous litigation to undo the effects of a judgment or to work out the desired effect by other means. A case which involved the corruption of judges was brought in 1297 before the King's Bench against a justice of Assize. The plaintiff alleged that he had successfully brought an action of abetment (under the statute of 13 Edw 1 c 12) against one who had procured someone else to appeal him of various robberies. As a consequence, he had obtained damages which were to be raised by the sheriff from the goods and chattels of the defendant. As this was executed, the latter sued a writ of trespass against the former with respect to the seizing of these goods. Thus, the former came before one of the justices who heard the action of abetment, who promised that he would avow his judgment and warrant him for the goods. However, the judge, "by the conspiracy and confederacy made between" the defendant, another person and him, disavowed his judgment and that he had awarded anything to the plaintiff. So that, as a consequence, this was convicted in the said action of trespass.[237] We do not know whether the judge was bribed, neither whether the other party was acting as a counselor for the

[235] *Thomas of Lewknor and Lucy his wife v. John, parson of Souldern* (1294) 58 SS 22, pl 10.

[236] Ib., 26. Cf. *William de Welbye vs William of Hemswell* (1301) 2 Inst 563 where one of the defendants, also a parson, successfully alleged his privileged position as *communis advocatus*.

[237] *William Gregory v John du Bois* (1297) 58 SS 73, pl 29.

defendant, but it is quite likely that there was such an arrangement. There is no indication of the verdict in this action however.

Likewise, the bishop of Durham, who, in an action of mort d'ancestor, had unsuccessfully pleaded that the plaintiff was a bastard, arranged counter-litigation with the sisters of the deceased to bring another action of mort d'ancestor against the said bishop of Durham so that the action would be stayed, and the title contested. The plaintiff in the first action petitioned the king to inquire into this "conspiracy and collusion" and to ensure that "he be not defrauded of justice by the suit of his aunts, maliciously fabricated against the same John to disinherit him."[238] The purpose of this petition thus, was not to redress a wrong, but to stay the new legal proceedings and determine the first cause.

It was also possible that barratry was preceded by the forgery of legal documents upon which the false litigation ensued. In the case of *Ralph of Banbury v. Robert son of Henry* (1298) 58 SS 73, pl 43 the defendant, along with others, was accused "through the conspiracy and confederacy made between them… to have maliciously drew up together and made a certain false will" in which a rent falsely was bequeathed to a certain woman. They also arranged that they should maintain this woman and her husband "in champarty [sic] so that they would plead the aforesaid false will." And after they so did so, "they divided that rent among them in accordance with the conspiracy etc. made between them." In *John Giffard v. Geoffrey of Stonehouse* (1298) 58 SS 80, pl 47 the defendant was attached to answer a writ of conspiracy alleging that he and another had "maliciously devised and made" a false bond where the plaintiff supposedly had bound himself to enfeoff the defendant's father or his heir for ten pounds worth of land or else to pay them two hundred pounds, a hundred pounds to the king, and a hundred more in aid of the Holy Land, and "falsely and maliciously caused a certain seal to be fabricated" and affixed to the deed. After the death of the defendant's father, the latter made the deeds and the conditions known, intending to demand and recover the land or else enforce the penalties.

Finally, there is a petition that illustrates how these cases related to the world of bastard feudalism that was crystalizing by the end of thirteenth-century England. In this

[238] Paul Brand, ed.,"Edward I: Parliament of 1307, Text and Translation," in *The Parliament Rolls of Medieval England*, ed. C. Given-Wilson et al., item 96. CD-ROM (Scholarly Digital Editions: Leicester, 2005, item 198.

petition, Richard complained that after having taken seisin of certain lands as a rightful heir for three weeks or more, his older bastard brother Robert "made an agreement with sir John de Grey and gave him ten marks to eject the aforesaid Richard from his inheritance and maintain the aforesaid Robert in his land, so that the aforesaid Richard was ousted from the said tenements by the power and force of the aforesaid sir John de Grey." The said Richard, as he "saw that he needed to have aid to maintain himself… allied himself through marriage" with one who approached Sir John de Grey "and gave him fifteen marks to oust" the bastard brother and reinstate him. Then the elder brother approached Reginald, the father of sir John de Grey, "and sold his right to the said sir Reginald and his heirs by collusion between sir Reginald and sir John and him," so that this ejected Richard. Then Richard brought an assize of novel disseisin against Reginald, but the latter, along with his son John, "so procured and threatened" the jurors that "through their harshness and their menaces which they made the truth could not be enquired or found." For all "this encompassing and this conspiracy," the petitioner prayed remedy to the king who answered that he was to "get a remedy in chancery by writ of champarty [sic] or otherwise according to the nature of this petition, if it seems expedient to him." This writ probably meant the writ of conspiracy.[239]

In these cases, we can see how, at this point, the frame of the agreement to support a plea for profit encompassed the concepts that would be later referred to with the terms *maintenance*, *champerty*, *barratry*, and *embracery*. Thus, it included mere bribery as well as the different corrupt arrangements to have a share of the chose in litigation, and the fabrication and incitation of false suits. Furthermore, the scope of these agreements extended to all the agencies that took part in the legal process (suitors, jurors, judges, officers, clerks) as well as third parties that could interfere with the process. There was, however, certain uncertainty as to the conceptual boundaries of the wrong which was emerging as is evidenced by the fact that there were still alternative lexicalizations for this action either as a writ of champerty or of conspiracy.

As to what plaintiffs sought with this action, sometimes they alleged economic loss as a consequence of the false litigation: In *Thomas of Lewknor and Lucy his wife v. John*,

[239] Paul Brand, ed.,"Edward I: Parliament of 1302, Appendix to Roll 12: Original Petitions and related materials, Text and Translation," in *The Parliament Rolls of Medieval England*, ed. C. Given-Wilson et al., item 96. CD-ROM (Scholarly Digital Editions: Leicester, 2005).

parson of Souldern (1294) 58 SS 22, pl 10, the plaintiffs declared that "they incurred very great loss." In *William Gregory v. John du Bois* (1297) 58 SS 73, pl 29, the plaintiff "has suffered damage to the value of two hundred pounds, and he produces suit thereof etc." In *Ralph of Banbury v. Robert son of Henry* (1298) 58 SS 73, a "loss to the value of forty pounds" was declared. And in *John Giffard v. Geoffrey of Stonehouse* (1298) 58 SS 80, the plaintiff affirmed that he "has suffered loss to the value of fifty pounds."

Most interestingly, it seems that that plaintiffs might have sought the review of verdicts based on false pleas and false evidence, and tainted by corruption, through the writ of conspiracy, and therefore to prevent or revert the effect of such false verdicts.[240] For one thing, the defendant in *Thomas of Lewknor and Lucy his wife v. John, parson of Souldern* (1294) 58 SS 22, pl 10, argued that with regard to an assize for which the plaintiffs had lost certain tenements, "he says that the justices, before whom that assize was taken, proceeded to take the aforesaid assize by the common law of the realm, and by the verdict of that assize they deprived the aforesaid Thomas and Lucy of the aforesaid custody by judgement, and that judgement still stands firm and cannot and by right ought not to be quashed by that writ of conspiracy." There is no indication of the opinion of the court, but the plaintiffs withdrew from the action. Likewise, in *William Hardegrey v. Alan Altman and others* (1294) 58 SS 197, pl 103, where excessive damages had been awarded by a corrupt jury, it was defended that the "plaint does not sound in conspiracy but rather for the purpose of attainting the jurors of the aforesaid inquisition of a false oath, which cannot be done without a writ of attaint from the chancery, and also for the purpose of quashing the judgement given upon the verdict of the aforesaid inquisition before the justices of the bench, which likewise cannot be done without a chancery writ." Furthermore, in this case, the defendant jurors also prayed their immunity as jurors and that the remedy in case of false verdict was the action or attaint:

[240] As for review before the verdict, in the civil cases there is no indication that the main proceedings should be concluded before suing conspiracy. A petition to the king shows an attempt to quash a false action by alleging that it had been brought "by conspiracy and collusion," Brand, "Parliament of 1305," item 198. Indeed, there is some suggestion that the action of conspiracy might have been used for the abusive purpose of staying legal procedure. The Mirror tells us that it was an abuse to bring writs of audita querela, or conspiracy without the substance of the complaint (Mirror bk 2 c 5). This is a mysterious reference to the writ of audita querela which is usually dated in the reign of Edward III; Theodore F. T. Plucknett, *A Concise History of the Common Law*. 5th. (Boston: Little, Brown and Co., 1956 [1929]), 394; 2 HEL 344. In *Richard vs Geoffrey et al* (1293) 57 SS 160, pl 70, when asked what conspiracy was, the plaintiff admitted that he did not know and withdrew from the action.

> they were indeed on the aforesaid inquisition, but they plainly say that with regard to this they made a good and lawful oath and that that oath still stands good. And, inasmuch as whatever they did in this matter they did in accordance with the law and custom of the realm and with what can be avowed before God and men, and also, if perjury has been in any way committed against the same William through their oath, the aforesaid William has his recovery against them by a writ of attaint from the chancery or otherwise by law of the land.

On the connection between attaint and the writ of conspiracy as means of review of corrupt verdicts, the subsequent development of the *villainous judgment* with which conspirators were visited when prosecuted through criminal proceedings may be revelatory. The punishment of the perjured jurors was so similar to the *villainous judgment* that it has been suggested that the latter developed "by accretions—some perceptible, some imperceptible" from the former.[241]

Before we move on to the use of the writ of conspiracy in criminal proceedings, a word needs to be said about the different ways of framing these cases of corruption and barratry in civil proceedings. In framing them as agreements to support parties to pleas for profit, the emphasis is laid on corruption and the instigation of false suits. However, the latter, which constitute most of these cases, can be also framed as frauds to deceive a court into depriving someone of his property. Indeed, in the language of these cases, as well as the abovementioned statutes, we have seen the use of words that can evoke that frame such as *collusion, machination, fabrication, invention, craft, engine*, and *fraud*. This is also the case of the word *maliciously*, which often cooccurs with *falsely*, and which within this context should rather be taken as meaning intention to defraud or deceive rather than hatred or intention to cause harm. Thus, the same situation can be potentially framed as a corruption and barratry, backgrounding the collusion or fraud, or as a collusion, backgrounding the corruption and barratry. This means that there is the possibility of a semantic shift in the legal meaning of *conspiracy* towards the second frame of collusion or deception of a court of law to obtain property, and hence towards collusion in general.

2.2.2 Extortion and Wrongdoing by Judicial Corruption and Barratry

Regarding corruption and barratry in criminal proceedings, most cases are concerned with the institution of criminal proceedings by making or instigating false accusations. In this

[241] Winfield, *Conspiracy*, 99.

sense, we should distinguish between the institution of such proceedings for the purpose of extorting people, and those aimed at harming them.[242] The former comes more easily within the scope of the frame of an agreement to support a false plea for profit, whereas the latter has more in common with the Statute Westminster II 13 Edw 1 c 12, which provided remedy for a particular kind of barrator, the one who abetted false appeals.

2.2.2.1 Extortion

Other than the abovementioned case under the reign of Henry III of the Winchester jurors who had formed a sort of criminal enterprise to prevent the prosecution of thieves who robbed foreign merchants for a share in the spoils, the first case of abuse of criminal justice for an economic purpose was brought by the writ of conspiracy. In *Gilbert vs Hugh Ragun and others* (1281) 55 SS 76, pl 55, the plaintiff complained that the defendants "*conspirators and confederates together for saving and condemning whom they willed in assizes, juries and inquisitions*, wherefore… [they] by their aforesaid confederacy falsely and maliciously indict the aforesaid Gilbert of the aforesaid death and of certain other trespasses, because he refused to pay blackmail, and on account of this procure his arrest and imprisonment."[243] Likewise, in 1302, the infamous *Company of the Pouche* was formed when the sheriff of Northampton "made a confederacy with several others of the county, that some of them should indict persons, and the others save them, for bribes, according as the same sheriff should arrange the panels," that is, some would indict innocent people, while others would save them on payment of blackmail.[244]

Sometimes, however, extortion was more of an opportunistic affair. In *Rex v. Robert de Herle Hilary* (1299) 58 SS 84, pl 5, it was manifested that the defendant, having desired

[242] For instance, the Ordinance of the Forest 1306 (34 Edw 1 c1) refers to those indictments made "upon the Command of one or perhaps two of the Foresters, or upon the Command of one or perhaps two of the Verderers; who from hatred or otherwise maliciously, that they may extort Money from some one, do accuse or indict whom they will; and thereupon do follow grievous Attachments, and the innocent Man is punished, who hath incurred no Fault or Offence at all" (ad d[i]c[tu]m unius, vel forsan duo[rum] de viridariis, qui ex odio, aut alias maliciose, ut ab aliquo pecuniam extorqueant, quenq[ue]m accusant vel indictant, & exinde sequnt[ur] attachiamenta g[ra]via, & punit[ur] innocens quem nulla om[n]nio culpla seu delictum constringit).

[243] Cf. the oath of the juror "to accuse conspirators who have unlawfully procured that a guilty person shall be saved, or that an innocent person shall be indicted at such inquests" (Mirror Bk I, c 13), as well as the articles of the Eyre abovementioned.

[244] Nichols, *Britton*, I, 38, n (1).

for a long time to get a manor, and having learned that a felony had been committed in which the owner of the manor could be involved, "he immediately procured her malicious indictment." After she had made a security promising to enfeoffing him of the said manor against a fine of two hundred marks, he "falsely, maliciously and by conspiracy procured a certain false inquisition of his confederates. And by that false inquisition the same… was falsely acquitted and released."

2.2.2.2 WRONGDOING

Most of the cases in which the writ of conspiracy was brought for corrupt criminal proceedings have less to do less with economic incentives, and more with the venting of personal grudges by either inciting or bringing false accusations. In this sense, during this early stage, the writ was used for all varieties of formal accusations instituting criminal proceedings in a court of law, as well as imputations of offences out of court.

As for false indictments, in *William Belle v Hugh le Cornwaleys and others* (1298) 58 SS 61, pl 35, the plaintiff complained that the defendants "by the conspiracy and confederacy made between them falsely and maliciously procured the indictment of the said… [plaintiff] for divers robberies and burglaries of houses before the lord king's coroners and bailiffs," and also that after being imprisoned for that accusation, the defendants had tried to fabricate evidence by putting the things he was supposed to have stolen in his house. Both things were found by the jury who also found that it was all done "by the hatred and malice he had towards" him.[245] In this case it seemed that the defendants were not indicting jurors, but rather *procuring* them. The case of *Thomas Piroun v. Adam of Walden* (1298) 58 SS 80-1, pl 48 illustrates how this procurement was done. According to the plaintiff, Adam of Walden, "by means of the conspiracy and confederacy maliciously made between him and a certain Adam Prat and by the gifts and promises which they made to twelve jurors of Loveden, abetted and procured those twelve to indict the aforesaid Thomas at the sheriff's turn… for thefts, robberies, murders and other crimes."

In other cases, it was probable that the defendants were the indicting jurors themselves. Thus, in *Simon Typet and Alice his wife v. John Amy* (1298) 58 SS 63, pl 36, the

[245] 58 SS 61, pl 35, 62.

allegation was that the defendant "by his conspiracy and confederacy indicted the aforesaid Alice of divers thefts." In *Nicholas of Thornton v. Peter Ivel and others* (1299) 58 SS 86, pl 52, the defendants were said to have, "by the conspiracy and confederacy made between them at Lincoln, indicted the aforesaid… constable of the castle of the aforesaid town, of harbouring thieves."

In addition to false indictments, there were also cases of abetment of false appeals. Hence, in *Nicholas of Thornton v. John of Romsey and others* (1294) 58 SS 34-35, pl 16, the plaintiff alleged that John of Romsey and the others "maliciously and by their conspiracy made a confederation together and for their bribe they prevailed upon a certain… an approver… to appeal the aforesaid Nicholas of harbouring… companion… the approver." Similarly, in *Ralph de Bylesfeld v. William of Oakham* (1297) 58 SS 49, pl 27, it was said that the defendant "procured by his conspiracy and the confederacy made between him and a certain Agnes Chaumpeneys of… and through his bribes to the same Agnes that she should appeal" the plaintiff. In the case of the *Prior of St. Neots v. Warin son of Warin* (1297) 58 SS 50 pl, 28, among other things, Warin had "procured a certain Denise of Weald to sue a writ of rape before the lord king against that prior, and the aforesaid Warin purchased that writ in that Denise's name. And he handed it over publicly in the county court of Huntingdon and there announced that a certain appeal was made against that prior."

Writs of conspiracy were also brought for incitation of accusations of lesser offences as well as of felonies. In *Robert del Hul v. Ralph Elsy and William le met* (1297) 58 SS 53, pl 30, the plaintiff complained that "by the conspiracy and confederacy made between them procured a certain William the chaplain of Burnham and John son of Hervey of Burnham falsely and maliciously to present before the sheriff at his turn… [that the defendant] was said to have ploughed up with his plough a great part of the lord king's highway." In *Gilbert, prior of St. Catherine's without Lincoln v. Thomas of Exton* (1301) 58 SS 106-7, pl 62, the defendant along with another, "by the conspiracy and confederacy maliciously made between them… falsely and maliciously leagued themselves together that they would give the treasurer and barons of the lord king's exchequer.. to understand that the same prior levied the lord king's aforesaid money by means of a certain roll containing a great sum of money, and he rendered his account of his aforesaid receipts at the aforesaid exchequer by a certain

other roll, containing in it five hundred marks fewer, and he kept the said five hundred marks in his own possession in deceit of the lord king's court."

Similarly, there were cases of accusations of ecclesiastical offences. Thus, in *Prior of St. Neots v. Warin son of Warin* (1297) 58 SS 50, pl 28, among other wrongs, the defendant was said to have accused the prior of incontinence before the bishop of Lincoln. Likewise, in the case of *Adam de Whytine and Johanna his wife v. Thomas son of Stephen of Blyth and Robert of Burton* (1300) 55 SS 95, pl 55, "through the conspiracy and confederacy made between them", the defendants presented that the plaintiff had committed adultery for which she was cited before the visitor of the archbishop of York. And in 1301, someone sued two parsons for conspiracy on the grounds of a previous false suit in an ecclesiastical court.[246]

Finally, the writ of conspiracy was used to remedy mere imputations of offences out of court which amounted to raising false reports or rumors. In *Prior of St. Neots v. Warin son of Warin* (1297) 58 SS 50-1, pl 28, Warin had made a conspiracy with another, and "by reason of the aforesaid conspiracy announced and proclaimed and caused the aforesaid William and Adam to proclaim through the whole countryside that the aforesaid prior" had publicly expressed his support to the French king. In *William de la Hoke v. master Clement of Patcham and others* (1298) 58 SS 63-64, pl 37, the defendants "by conspiracy and confederacy made between them... up a certain letter for the purpose of accusing the aforesaid William of homicides, thefts and harbourings of thieves," and sent that letter to the king who ordered his imprisonment thereof. In *Master John de Tybetot v. Humphrey Cryketot and others* (1298) 58 SS 82, pl 49, the defendants were accused of "by the conspiracy and confederacy made between… [making] a malicious imputation against the same master John that he had in contempt of the lord king excommunicated the lord king's bailiff." As a consequence of this accusation, the bailiff complained before the auditor of having been improperly excommunicated by the plaintiff.

It should be noted that some of these cases where there is a false imputation of an offence such as it would bring the defendant before a court of law are described as defamation or slander. Thus, in the case of *Prior of St. Neots v. Warin son of Warin* (1297) 58 SS 50, pl

[246] 2 Inst 562.

28, the spreading of false rumors that the plaintiff was expressing his support to the king of France was said to be a "slander [which] reached the council of the lord king of England and the barons of his exchequer, wherefore the lord king conceived a mighty indignation against that prior." In *Adam de Whytine and Johanna his wife v. Thomas son of Stephen of Blyth and Robert of Burton* (1300) 55 SS 95, pl 55, the defendants were said to have "defamed… Johanna… with respect to… adultery," and the defendants defended that "Johanna was never defamed, harassed or oppressed through their conspiracy, but through common rumour." In *Gilbert, prior of St. Catherine's without Lincoln v. Thomas of Exton* (1301) 58 SS 106, pl 62, a false information of embezzlement was considered a "disgrace and slander."

Most of the cases in which criminal proceedings are instituted by formal accusation include allegations of the imprisonment of the plaintiff as a consequence of it, usually until he could clear himself.[247] Though there is no direct allegation of vexation in any of these cases, that of *Stephen of Holderness v. Robert Mengy and William Mareny* (1294) 58 SS 18, pl 7, cannot be described except in that way. There, the plaintiff complained that the defendant, a bailiff, not only had procured that he was convicted of a false indictment of trespass, but had also procured him to be falsely sued, and attached him to appear for an inquisition only to find out later that he was not impaneled for the same. In addition to harm, the complainants also alleged economic loss as a consequence of the unlawful prosecution[248]

As already suggested, the word *malice*, which along with *falsely* invariably appears in these cases of false accusation, could evoke different frames according to the context. That within this one it profiles the concept of evil intent arising of ill will or hatred against the background of justification of prosecution is evidenced by these cases in which there is specific reference to the concept. Thus, in *Ralph de Bylesfeld v. William of Oakham* (1297) 58 SS 49, pl 27, it was explained by the plaintiff that the defendant was in debt to him, and that "in order to avoid payment of the same debt procured by his conspiracy and the confederacy made between him and a certain" woman that this should appeal the plaintiff of

[247] 55 SS 76, pl 55; 58 SS 34, pl 16; 58 SS 61,62, pl 35; 58 SS 63, pl 36; 58 SS 63, pl 37, though there is a false report because of which criminal proceedings are instated; likewise, 58 SS 82, pl 49; 55 SS 86, pl 52.

[248] 58 SS 18, pl 7; 58 SS 54, pl 16; 58 SS 49, pl 27; 58 SS 49, pl 27; 58 SS 52, pl 29; 58 SS 53, pl 30; 58 SS 63, pl 36; 58 SS 63, pl 37; 58 SS 73, pl 43; 55 SS 80, pl 47; 58 SS 82, pl 49; 55 SS 86, pl 52; 55 SS 95, pl 55; 58 SS 106, pl 62.

homicide, and that this was a "conspiracy made in malice." The Prior of St. Neots explained in his suit that the mother of the defendant had been amerced in his court several times, and that the he had prayed him to remit these amercements. And that since he refused to remit them, the defendant entered into a conspiracy with two others and "procured them to harass… [him] as much they could."[249] The prior of St. Catherine's without Lincoln complained that the defendant, "for the purpose of altogether destroying that prior and his aforesaid house, falsely and maliciously leagued" with others to falsely inform about him to the Exchequer. The jury indeed found that "by malice aforethought and prearranged conspiracy between [the defendant and another] … sent word to various rectors of churches in those parts that those rectors should agree with [them]… and join themselves with them to prosecute and maintain the said conspiracy and malice prearranged between them, to the end that they might destroy the aforesaid prior and his house even as the same prior had previously destroyed them."[250]

Sometimes the defendants reply having a good cause for suspicion. In his action, John de Tybetot argued that, because he had refused to supply the defendant with corn, "by the conspiracy and confederacy made" with others, the latter "made a malicious imputation against" him.[251] Adam de Whytine argued in his suit that the defendants had accused him of adultery with one Johanna with the intention to cause them "to expend their goods and endure undue toil and trouble." The defendant replied that she "was never defamed… through their conspiracy, but through common rumour."[252] Similarly, in *William Belle v. Hugh le Cornwaleys and others* (1298) 58 SS 61-62, pl 35, it was defended that "it was common rumour throughout all the district that the aforesaid William was guilty of thefts, as is aforesaid, and for that cause he was arrested and not by their conspiracy." The jury, however found that "Hugh le Cornwaleys by the hatred and malice he had towards the aforesaid William Belle procured the indictment of the same William for the aforesaid robberies and other felonies, and afterwards he put a certain charter in that William's bed, saying that the same William had stolen the aforesaid charter." And Adam of Walden defended the writ

[249] 58 SS 50, pl 28.

[250] 58 SS 106, 108, pl 62.

[251] 58 SS 82, pl 49.

[252] 55 SS 95, pl 55.

brought by Thomas Piroun arguing that "it was common rumour of the countryside that the aforesaid Thomas was a thief and housebreaker, for which reason he was indicted in due manner by the aforesaid dozen before the sheriff at his aforesaid turn and not by his conspiracy or false confederacy."

In most of these cases, the party bringing the suit had been previously acquitted of the offence falsely charged upon them. In one case, it was defended that the plaintiff "does not say in his plaint that he went away acquitted of the aforesaid appeal before the justices or in any other way in form of law," to which the court agreed.[253] Likewise, in another case it was successfully defended that the complaint about a false presentment should not be answered because the defendants "were indeed presentors before the aforesaid sheriff and presented the aforesaid presentment against him, which still stands unchanged."[254]

2.2.2.3 Disturbance of Right, Extortion and Wrongdoing

That disturbance of right, extortion and wrongdoing were connected with judicial corruption both of civil and criminal proceedings is evidenced by the oaths that the legal agencies involved in them had to take. Already in Anglo-Saxon law the accuser's foreoath said that "by the Lord, I accuse not N either for hatred or for envy, or for unlawful lust of gain; nor know I anything soother; but as my informant to me said, and I myself in sooth believe" (2 HEL 108, Stephen). The Statute of Exeter[255] provided that the oath of the juror of the Grand Inquest should be "I will truth say, and nothing conceal, nor suffer to be concealed nor suppress before you, for Promise or Gift, for Terrour or Doubt, nor for Affinity or Alliance, nor for Love or Hatred, nor by others abetting or procuring."[256] In the Statute for Oaths of the King's Officers, the sheriff had to swear that "I will not leave [right and reason] for Rich nor for Poor, neither for Love nor for [Gain '] but I will lawfully do it."[257] The Oath

[253] 58 SS 49, pl 27.

[254] 58 SS 53, pl 30, 54.

[255] This and the following statutes are classified by the Statutes of the Realm as of uncertain date; I therefore only provide their title, but no date or regnal year.

[256] "Jeo dirrai v[er]ite e rien ne concelerai ne soffai estre celee ne murdrai devaunt v[ous] p[ur] p[ro]messe, doun, ne tremour, ne doute ne affinite, ne aliaunce, ne am[our], ne haine, ne p[ar] aut[er] abet, ou p[ro]curement."

[257] "E ceo ne lerrai [right and reason] pur Riche ne pur puore ne pur amour ne pur haunge, qe leaument nel fray."

of the Sheriff pledged that "lawfully and rightfully you will treat the People of your Bailiwick, and to every one you will do right, as well to the Poor as the Rich, in that which to you belongeth to do: And that for Gift, nor for Promise, nor for Favour, nor for Hate, you will not do wrong to any, nor disturb the Right of another."[258] According to the Form of the Oath of those of the King's Council (uncertain date), these councilors had to swear that "you will not leave for any Man, for Love, nor Hatred, for good Will, nor for ill Will, but that you will cause to be done to every one, of what Estate or Condition soever lie be, Right and Reason, according to your Power and Knowledge; And that of none will you take any Thing for doing of Wrong or delaying of Right."[259] Escheators swore that "for Gift, nor for Promise, nor for Favor nor Hate, you will not do Wrong to any, nor the Right of another will you disturb" (The Oath of the Escheators)[260]. Finally, Mayors and Bailiffs promised that "for Greatness nor for Riches, nor for Gift, nor for Promise nor for Favour, nor for Hate, you will not do Wrong to any; that you will disturb no Right" (The Oath of Mayors and Bailiffs).[261]

2.2.2.4 Genealogy of the Writ of Conspiracy as Applied to Wrongdoing

One more thing needs to be said about this use of the writ of conspiracy to remedy wrongful prosecution. On close inspection, the similarities with 13 Edw 1 c 12 are striking, thus suggesting that the writ of conspiracy was a conceptual blend between the frame of conspiracy as encoded in the Edwardian legislation, and that statute.

Indeed, 13 Edw 1 c 12 refers to those who incite accusations out of ill will as those who, "through Malice intending to grieve other, do procure false Appeals to be made of Homicides and other Felonies by Appellors," or "by whose Abetment or Malice," or "Abettor through Malice." It provides remedy "having respect to *the Imprisonment or Arrestment* that the Party appealed hath sustained by reason of such Appeals, and to *the Infamy* that they have incurred by the Imprisonment or otherwise." And it requires that those "being appealed of

---

[258] "Loiaument & a droiture auxibien a poure come a riche, en ce qe a vous appent afaire; et q[e] por doun ne por p[re]messe ne por favour ne por [haunge] tort ne freeta a nuli, ne autri droiture ne desturberetz."

[259] "Ne lerrez pur nully, pur amur, ne haour, pur bon gre, ne pur mauveis gre, qe vous ne facez faire a chescun de quel estat ou condicion qil soit, droiture & reison, solunc v[e]re poiar & a v[e]re escient, & qe de nully rien ne p[re]ndrez pur tort faire ne droit delaier."

[260] "Pur don[e], ne pur promis, ne pur favor, ne haire, tort ne feres a nully, ne auter droiture ne distourbere."

[261] "Pour hautesse, ne pour richesse, ne pour don, ne pour promis, ne poir favor, ne pour haier, tort ne faires a nulluy."

Felony surmised upon him, doth acquit himself in the Kings Court in due Manner, either at the Suit of the Appellor, or of our Lord the King, the Justices."

It could be said that this use of the writ of conspiracy expanded the narrower focus of 13 Edw 1 c 12, which was limited to criminal proceedings by false appeals. Indeed, the overlapping between the two actions in case of procurement of false appeal was not missed by defendants who pleaded it to bar the action. In 58 SS 34, 35, pl 16, where the complaint was that the defendants had by their conspiracy bribed an approver to appeal the plaintiff of harboring criminals, the former said "that he ought not to be answered on this writ, because they say that that plea is a plea of abetment and sounds more in abetment than in conspiracy and, inasmuch as the aforesaid Nicholas can have his recovery by writ of abetment which is more suitable to his case."

Indeed, if we go further back in the genealogy of this action, it is evident that 13 Edw 1 c 12 was conceptually related to the writ of *odio et atia*, which provided remedy for false imprisonment upon appeals or indictments out of ill will, and with the action of defamation, both in Ecclesiastical and local courts, which remedied the false imputation of offences for which canonical purgation might ensue.[262] I will discuss now the way in which all of these laws relate to the frame of justification of prosecution.

2.2.2.5 Wrongful Prosecution and Justification

Through the writ of conspiracy, a remedy was offered for false accusations and false imprisonments. Since this remedy paralleled those offered by the statute 13 Edw 1 c 12, the writ of *odio et atia*, and the action for defamation in ecclesiastical and local courts, it is palpable that litigants drew on these actions as models for the writ, creating a blend between the writ of conspiracy and them—in this sense, we should recall that the prototypical meaning of this writ would be agreements to bring and/or support false pleas for profit, in disturbance of right. Thus, the resulting offence was something like the making or inciting by agreement of false accusations out of ill will and without just cause as a consequence of which innocent people are imprisoned and aggrieved. How are we to understand this wrong in more abstract

[262] At this time, people who had been indicted and acquitted could bring actions for defamation against the indicting jurors in ecclesiastical courts; Plucknett, *Concise*, 127.

terms? In other words, how are we to classify this wrong as remedied by the law of conspiracy?

One way to frame this offence is as one against the administration of justice. We can understand it as an abuse or perversion of justice, that is, as a misapplication or misuse of the process of law to produce an effect other than that intended by it. Most of the historiography of the medieval conspiracy takes this view about the offence of conspiracy, emphasizing that criminal process is being used for a purpose other than the administration of justice, rather than the wrongful purpose itself.[263] Within this view, the wrong itself is not the harm caused to the party, but a more abstract one against public justice, or against the state. And it implies that one has a right to do something or an office that can be misused.

However, another way to put it, in more general terms, is as the commission of a wrong against an individual without justification. Indeed, it can be argued that a false imprisonment is a wrong against the individual freedom, that a false accusation is a wrong against the person's reputation, and that the accusation, particularly when it is of felony, when successful, is indeed a wrong against life and property as his land and chattels escheat to his lord or to the king in defect of the latter. I will argue that the medieval law took the second view rather than the first, that there was no emphasis on the abstract notion of abuse of justice but rather on the wrongs committed through justice. And this is consistent with the fact that these conducts were remedied through actions as wrongs for which individuals sought compensation.

The expression *ex odio* presupposes the frame of justifiable homicide, which in turn is embedded within the theological model of homicide. Within this model, the starting point should be an absolute prohibition of committing homicide as prescribed by God's law. With that starting point we find that there are situations that immediately need to be justified. This is particularly true of the fact that human justice involves the exercise of capital punishment. Thus, those involved in the administration of justice not only commit or are accomplices of homicide, but can all be presumed to have an intention to cause the death of somebody by the mere fact of being involved in it. The solution to this moral problem is to consider that

[263] "Ancient conspirators are those who combine, and so far they resemble their present descendants. But combine to do what? In effect to abuse legal procedure," Winfield, *Conspiracy*, 2.

the administration of justice is a justified situation in which a person can intend and bring about the death of another for the sake of justice.[264]

But this then raises the question as to when this justification does not hold. It is here where motives matter. Bracton tells us that when one commits homicide in the administration of justice it is not justified "if done out of malice or from pleasure in the shedding of human blood [and] though the accused is lawfully slain, he who does the act commits a mortal sin because of his evil purpose."[265] By contrast, when it "is done from a love of justice, the judge does not sin in condemning him to death, nor in ordering an officer to slay him, nor does the officer sin if when sent by the judge he kills the condemned man."[266] And he further adds that "both sin if they act in this way when proper legal procedures have not been observed."[267] (Bracton, II, 340). Thus, we have that the lawfulness of the legal homicide depends on the motives of those involved in the administration of justice, whether they pursue justice for its own sake, or whether they instead act out of ill will and blood thirst. Likewise, to be lawful, the homicide must be under due process of law, and a summary execution will not be lawful even if it is pursued to advance justice. Furthermore, it should be noted that this intention to cause the death of somebody by these motives is qualified as a corrupt intention. Another term to refer to that concept is the term *malice*.

The more general problem that lies behind this problem of homicide is that the administration of justice involves causing several harms such as arresting, imprisoning, and

[264] In Bracton's classification of homicides, one heading is homicide "in the administration of justice, as when a judge or officer kills one lawfully found guilty," Bracton, II, 340. The frame of justifiable homicide can also be viewed within the context of the rise of royal criminal justice and the slow but sure displacement of the traditional systems of blood feuds and compositions as a way of dealing with crime. It can be argued that hatred and greed were two of the emotions that were at the basis of this system as it was designed to quench the thirst of blood with money. The Church condemnation of these emotions might be but an attempt to purify the new system of justice springing from God itself from the remnants of a pagan past. It was also a way to prevent that Godly justice, as delegated upon the king as his vicar, would relapse into the old ways. An accuser now was a representative of that justice and could not be seeking revenge and blood, nor be encouraged by the expectation that land would escheat into his hands. Rather, they should act in discharge of their duty to prosecute criminals and do justice and only with reference to the legal process.

[265] "Si sit ex livore vel delectatione effundendi humanum sanguinem, licet ille iuste occidatur, iste tamen peccat mortaliter propter intentionem corruptam."

[266] "Si vero hoc fiat ex amore iustitiae, nec peccat iudex ipsum condemnando ad mortem, et praecipiendo ministro ut occidat eum, nec minister si missus a iudice occidit condemnatum."

[267] "Peccat uterque si hoc fecerit iuris ordine non servato."

punishing persons. In that sense, it can be said that all prosecutions are wrongful, the difference being that when the defendant is justified then it would be *damnum absque inuria*. Therefore, any action in furtherance of the same can be presumed to have an intention to cause harm, and can only be justified with reference to the motives that move those who carry out these actions, as when prosecutors and other trial officers seek revenge or profit.

In the example above, Bracton talks about cases in which there is a just conviction. As we see, this is not enough for justifying a legal infliction of harm. There must be a rightful mind as well; it cannot be for the wrong reason. What about the cases in which there is an unjust prosecution and/or conviction? Then, this state of mind would inevitably become part of the standard of error as well. Harm caused by error would only be justified if done in pursuance of justice, and would become liable if springing from that evil heart. Indeed, we would then be talking about a true miscarriage of justice and not of an error.[268]

We find this frame of justifiable harm invoked both in ecclesiastical and secular laws regulating the conduct of accusers. Thus, the Constitution Auctoritate dei patris which created defamation, provided for the excommunication of all who "for the sake of hatred, profit or favour, or for whatsoever other cause, maliciously impute a crime to any person,"[269] rendering defamation dependent upon the motives of the defamer. The same requirement that reports are not out of hatred and with just cause appears in the process of canonical purgation: "the fame must be public; private opinion would not suffice. It must be held as the opinion of trustworthy persons; the opinions of one's enemies of habitual perjurers did not count. And there must be some real suspicion of crime; idle rumour was not enough."[270]

Likewise, with the writ of *odio et atia,* the pre-trial action that allowed prisoners to challenge their accusers on the grounds that they had made their accusations out of hatred and spite relied on the frame of justifiable wrong. This writ has been suggested to be as old

[268] It might be argued that this is the case of the abovementioned *Auctoritati dei patris*, but the truth of the imputation was never admitted as a defense against the action of defamation in Ecclesiastical courts. So, even in the accusation was true, the action stood; R. H. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the* 1640s., vol. 1 of *The Oxford History of the Laws of England* (Oxford: Oxford University Press, 2004), 582-3.

[269] Ib., 572.

[270] R. H. Helmholz, *Select Cases on Defamation to 1600* (London: Selden Society, 1985), xxiii.

as the reign of Henry II, but the earliest evidence goes back to the beginnings of John's reign.[271] The writ reached its maturity in the thirteenth century, but its use declined in the next century, and it became an antiquity until early modern commentators decided to unearth it as part of Magna Carta.[272] The main purpose of the writ seemed to be the release of prisoners pending trial at the next eyre[273] or as Bracton puts it, "but since it is iniquitous that the innocent as well as the guilty be kept in prison for a long time, therefore, at the doleful plaint of kinsmen and friends and by grace of the lord king, an inquest is ordinarily made as to whether such persons imprisoned for homicide were guilty of the said death or not, that is, whether they were appealed because of hate and spite."[274] The accusations being challenged could be either in the form of appeals or indictments.[275] Though it seems that it was not limited to accusations of homicide, it also seems that this was the most common form of the writ.[276] It is unclear whether the writ was cursory or not.[277] The writs commanded the sheriff to make an inquisition[278] whether the accused " was accused (or 'appealed') of that death because of hate and spite or because he is guilty thereof. And if because of hate and spite,

[271] Winfield, *Conspiracy*, 17; Jenks, "Odio et atia," 4.

[272] Jenks, "Odio et atia," 6-8; Winfield, *Conspiracy*, 21-22

[273] Jenks, "Odio et atia," 2, 7. Cf. Winfield, *Conspiracy*, 21-24; Winfield ventured that the purpose of the writ was neither to release prisoners pending trial, nor to quash unwarranted appeals, but mainly to allow appellees to avoid trial by battle and put themselves before a sworn inquest. Indeed, Winfield suggested that the writ *de odio et atia* manifested the royal dislike of the appeal procedure and how its inquisition procedure was a stepping stone that paved the way for resorting to jury trial after 1215. More recently, Susanne Jenks has argued that scholars like Winfield believed that the purpose of the Writ had initially been to challenge and put an end to the appeal procedure, and that after 1215, the main purpose was to release prisoners pending trial. The problem is that these scholars did not distinguish between two contemporary procedures: the writ of *odio et atia* and the plea *odio et atia* to the appeal after the prisoner had made answer to the charge. The purpose of the writ was clearly to release prisoners before trial, but the purpose of the plea of *odio et atia* to an appeal was to quash it, thus ending the procedure. Consequently, when these scholars thought to be talking about the writ of conspiracy before 1215, they were probably talking about the exception instead; Jenks, "Odio et atia," 3-4.

[274] Bracton II, 346: "Sed quoniam iniquum est quod innocentes sicut illi qui criminosi sunt diu inclusi detineantur in carcere, ideo ad lacrimosam querelam parentum et amicorum, de gratia domini regis fieri solet inquisitio, utrum huiusmodi imprisonati pro morte hominis culpabiles essent de morte illa vel non, et utrum appellati essent odio vel atya."

[275] Jenks, "Odio et atia," 2, 4; Winfield, *Conspiracy*, 19-20.

[276] Jenks, "Odio et atia," 6; Winfield, *Conspiracy*, 19.

[277] Jenks, "Odio et atia," 5; Winfield, *Conspiracy*, 20.

[278] This very procedure was very soon perverted and provisions had to be adopted to prevent Sheriffs too willing to help prisoners from impaneling biased jurors; Jenks, "Odio et atia," 4; Winfield, *Conspiracy*, 21.

because of what hate and what spite and who is guilty thereof".[279] If the inquisition taken before the sheriff found against the accuser, a writ was issued to the sheriff to bail the accused once he had found sureties that they would come to court to stand trial. A verdict finding no hatred or spite, by contrast, meant the accused remained in prison until trial.[280]

Regarding the question posed to the jury, that is, whether the accused was appealed because of hate and spite or because he was guilty, this can be interpreted in two ways. If we think of the conjunction as having an exclusive value, then the finding of one implies the negation of the other. But it can also be interpreted coordinately as requiring both, in which case the jury would have to establish two questions: whether the appeal was improper, and whether the accused was innocent. However, I think the most plausible interpretation is that by *culpabilis* in this context, the writ did not refer to the question of guilt but to that of suspicion. We should remember that in the medieval mindset an accusation to which the appellor swore was half a conviction, and that the line between suspicion and guilt was very fine. That is why an instance of the jury verdict could be that the prisoner "non est culpabilits de morte predicta, set quod tali odio et atia appellatum."[281] It is also the reason why some variants of the formula found in the exceptions were "utrum ipse appellat per hanc atiam et per hoc odium an justa causa et quia inde culpabilis sit[282] or "si ipsi sunt culpabilits de morte illa et si appellum istud factum sit per odium et athiam an justa causa."[283] In these phrases, *culpabilis* appears as the opposite of *odium an justa causa*. That is, the accusation was brought not in pursuit of justice and without a reasonable cause. In other words, the question was whether there were grounds or cause to prosecute the accused or not, and whether the accuser acted in pursuance of justice. Furthermore, in Bracton's definition, there were yet two more questions for the jury to establish in case *odio et atia* was detected: "And if because

[279] Bracton II, 347: "Rettatus sit vel appellatus de morte illa odio et atya vel eo quod inde culpabilis sit. Et si odio et atya, quo odio et qua atya, vel quis inde culpabilis sit." Initially, the writ did not include the issue of the innocence of the accused, but it then became the standard form in the thirteenth century; Jenks, "Odio et atia," 4; Winfield, *Conspiracy*, 15-16.

[280] Jenks, "Odio et atia," 2, 6; Winfield, *Conspiracy*, 16. It is likely that this inquiry into innocence made Winfield believe that this was a forerunner of the jury trial.

[281] C 144/3/1 cit. in Jenks, n. (53) 17.

[282] Calendar of Close Rolls IV, 264-5; cit. in Jenks, "Odio et atia," 18, n (49).

[283] Calendar of Close Rolls VII, 49-50, cit. in Jenks, "Odio et atia," 18, n. (49).

of hate and spite, because of what hate and what spite and who is guilty thereof".[284] This further inquest cannot but mean that the jury had to find what the reason of the enmity between accuser and accused was, that is, whether there was any dispute or conflict pending between them.

Finally, since in the thirteenth century trial jurors were drawn out of the indicting jury, judges were advised to inquire about the way the jurors informed themselves, because they sometimes found out that "many scandalous things may be discovered. It sometimes happens that a lord accuses his tenant, or causes him to be indicted and a crime imputed to him, through a greedy desire to secure his land in demesne, or one neighbour accuses another through hatred and the like."[285] Thus, motives similar to those that disqualified an appellor, constituted the grounds to challenge indicting jurors to become trial jurors.[286]

2.2.2.6 Homicide in Will

In conclusion, there is plenty of evidence that contemporaries understood imprisonment and other parts of the legal process as wrongs inflicted through the machinery of justice. In those cases where the defendants could not deny having brought a false accusation, the fundamental question was whether they had a justification for committing such wrongs. Motive and purpose were thus central, for according to the theory, one is justified if one does so for the sake of justice and not because of personal grudge. The standard defense in these cases is having a reasonable cause of suspicion, such as that it was public fama that the accused had committed a crime. This defense, however, does not necessarily deny ill will. One can act upon some factual reasonable ground, and still hate the accused person. Thus, rather than implying, the law presumes that when there is a reasonable

[284] "Et si odio et atya, quo odio et qua atya, vel quis inde culpabilis sit," Bracton II, 347.

[285] "Multæ inveniri poterunt inconvenientiæ. Evenit quidem quandoque quod dominus tenentem suum indictat, vel indictare facit et ei crimen imponi ob cupiditatem terram suam habendi in dominico, vel vicinus vicino propter odium et huiusmodi," Bracton II, 404.

[286] Jenks takes this passage to be referring to exceptions of *odio et atia* in indictments "in order to prevent unjustified accusations from being made in the first place," but there is no indication that if judges found an indictment suspicious the indictment was quashed and the prisoner released. Rather, the process of challenging is aimed "ut ad iudicium securius procedatur et ut periculum et suspicio tollatur;" This interpretation is indeed consistent with Jenks's further illustration that the exception was not always available in a case where "an indicted person is acquitted because the people he was supposed to have killed were all still alive and because the jury found out, quod indictatus fuit odio et atia et per abettum," Jenks, "Odio et atia,"12, n. (14).

ground for suspicion the accusing party was acting for the sake of justice and not out of malice.

Thus, from this point of view, the false accusation of felony can also be considered as a form of homicide, or as an attempt of homicide when the accusation fails. Put in other words, be a homicide under color of law. There is some evidence of this view in contemporary authors. The talionic punishment for the Roman *crimen calumniae* which visited the accuser with the wrong he had intended on the accused, on the basis of which Bracton reinterprets the procedure by appeal, also attests to this view of the false accusation as an attempt of murder: "if the appellor is vanquished let him be committed to gaol to be punished as a false accuser (but he will lose neither life nor members, though according to the laws he would be liable to the talionic penalty if he had failed in his proof."[287] The Mirror of Justices classifies as homicides in will those:

> who torture a man so that he confesses to a mortal sin he has not committed, and, to alleviate torment, preferring death, falsely confess a felony… [and] those who are brought to their end by the records of coroners or justices… also false jurors, false witnesses, and those who appeal others or defame them by indictment, or otherwise accuse persons falsely so that it is not their fault that death does not follow… [also] those who imprison folk in such places, or put them in such pain, that it can be found by inquest that they were nearer death by such evil places or pains. In three ways was God killed, for Longinus killed him in fact with the others who hung or tortured him. By tongue or by word Pilate killed him, for he ordered his killing, and by will the false witness killed him, as did all those consenting thereto.[288]

Thus, he argues that "those who appealed or indict an innocent man of a mortal crime and do not prove their appeals or assertions… were formerly adjudged to death, but king Henry I ordained this mitigation, that they should be adjudged, not to death, but to corporal punishment."[289] Britton, likewise, argues that the offence of homicide "inasmuch as this felony may be committed under colour of judgment through malice of the judge, or under some other pretence, as by false physicians and bad surgeons, and by poison and sundry other ways, our pleasure is, that all those who have committed such secret felonies be indicted; and

---

[287] "Si autem appellans victus fuerit, gaolæ committatur tamquam calumniator puniendus, sed nec vitam amittit neque membra, licet secundum leges ad talionem teneretur si in probatione deficeret," Bracton, II, 386.

[288] Mirror bk I, c 9.

[289] Mirror bk I, c 16.

also those who falsely for hire, or in any other manner, have condemned, or caused to be condemned, any man to death by means of a false oath."[290]

I should draw attention to the expressions *homicide in will* and *secret felony* used by the Mirror of Justices and Britton to describe this form of homicide. By them, they emphasize the mental element as the most important aspect in rendering certain conducts criminal. This is consistent with the idea of the wrongful prosecution as depending on the motives of the prosecutor.

Furthermore, this view of the wrongful prosecution as a form of homicide can be seen in the way it brings forward premeditation, which is the distinctive aspect of murder, as one of the elements of the offence. Thus, in the case of *Gilbert, prior of St. Catherine's without Lincoln v. Thomas of Exton* (1301) 58 SS 106, pl 62, 106-7 it was alleged by the plaintiff that the defendants:

> by the conspiracy and confederacy maliciously made between … for the purpose of altogether destroying that prior and his aforesaid house, falsely and maliciously leagued themselves together that they would give the treasurer and barons of the lord king's exchequer at York on the Morrow of Michaelmas in the aforesaid year to understand that the same prior levied the lord king's aforesaid money by means of a certain roll containing a great sum of money, and he rendered his account of his aforesaid receipts at the aforesaid exchequer by a certain other roll, containing in it five hundred marks fewer, and he kept the said five hundred marks in his own possession in deceit of the lord king's court.
>
> And the jury found that:
>
> *by malice aforethought and prearranged conspiracy between* them… sent word to various rectors of churches in those parts that those rectors should agree with that Thomas and Richard and join themselves with them to prosecute and maintain *the said conspiracy and malice prearranged between them, to the end that they might destroy the aforesaid prior* and his house even as the same prior had previously destroyed them, as the same Thomas and Richard asserted… Thomas and Richard, *continuing their malice,* gave the treasurer and barons of the exchequer to understand that the aforesaid prior had falsely and in deceit of the lord king and his court levied his money.[291]

[290] "Et ceux ausi q[ue] fausement pur lower ou en autr[e] manere ou[n]t nul home dampne ou fait dampner a la mort p[ar] fauz serme[n]tz," Britton, I, 14.

[291] 58 SS 107-108.

2.2.3 Sole Defendant

Despite the allegation of conspiracy, most of the early cases brought under the new writ were actions against a sole defendant. This is in stark contrast with the narrow requirement of the latter form of action of conspiracy that there should be a plurality of defendants. And it suggests that cooperation was not considered part of the wrong nor aggravated it. The wrong is not the combination to bring a false accusation or to defraud someone of his property, but rather that these wrongs were committed *by conspiracy*. That is, these wrongs were committed by means of corruption and barratry. That is why there can be a sole defendant and that he can still allege conspiracy. Indeed, these statutes talk about *conspirators* rather than conspiracy in abstract terms. Conspirators are those corrupted or corrupting others, as well as the barrators. One can allege that the defendant disinherited or falsely accused him by corrupting a jury, or that a jury by corruption did falsely accuse or disinherit him.

2.3 The Definition of Conspirators

In 1305, the first trailbaston commission was issued by parliament ordering the trailbaston justices to try at the suit of the king those who disturb the peace intimidating jurors and retaining malefactors. The justices that visited York wrote a letter complaining that no serious indictment had been made as many of the serious offences were concealed "par procurement et aliaunces des genz du pais." Corruption indeed seemed endemic in that part of the country, as the Yorkshire eyre of 1294 revealed "that there were son man and so influential maintainers of false plaints and champertors and conspirators leagued together to maintain any business whatsoever etc. that justice and truth are completely choked." As a way to extend the insufficient commission and allow the justices to make inquiries into conspiracies, it is almost certain that the opportunity was seized to cast the new ordinance of conspirators, also known as the Definition of Conspirators, add it to the ordinance of

trailbaston, and send its transcript to the justices.[292]. The ordinance, as it appears in the Parliamentary Rolls,[293] states the following:

The ordinance concerning conspirators. Conspirators are those who make alliances among themselves by oath, agreement, or through some other bond, that each will help and support what the other undertakes in falsely and maliciously indicting or causing to be indicted, or falsely acquitting, people, or falsely initiating or supporting pleas, and also those who have children under age appeal people of felonies, through which they are imprisoned and greatly harmed, and those who retain men of their area by robes or payments, to support their evil undertakings and to suppress the truth, both those who take and those who give, and stewards and bailiffs of great lords who through lordship, office or power undertake to maintain or uphold pleas or disputes for parties, other than those which concern the estate of their lords or themselves. This ordinance and final definition of conspirators was made and definitively agreed by the king and his council in this parliament etc. And it is ordained that the justices appointed to hear and determine various trespasses and felonies in each county of England are to have a transcript of it etc.	Ordinacio de conspiratoribus. Conspiratours sount ceux qui sentre alient par serment, covenaunt, ou par autre alliaunce, qe chescun eidra et sustendra autri emprise \de/ fausement de fausement et maliciousement enditer ou faire en diter, ou fausement acquiter les gentz, ou faussement mover plees ou meintenir, et auxi ceux qe fount enfauncz deincz age appeler la gent de felonies, par quei il sount emprisonez et moult grevez, et ceux qe receivent gentz de pais a leur robes ou a leur feez pur meintenir lour mauveis emprises et pur verite esteindre, auxi bien les pernours come les donours, et seneschaux et baillifs de grauntz seignurs qui per seigneurie, officie, ou poeir, enpernent ameintenir ou sustenir pleez ou baretz pur parties, autres qe celes que touchent lestat lour seignurs ou eux meismes. Ista ordinacio et finalis diffinicio conspiratorum facta fuit et finaliter concordata per regem et consilium suum in hoc parliamento etc. Et ordinatum est quod justiciarii assignati ad diversas transgressiones et felonias in singulis comitatibus Anglie audiendas et terminandas {*Altered from 'terminendas' by a later hand}*habeant inde transcriptum etc.

The version of this ordinance by the Statutes of the Realm, 33-34 Edw I (1305-6), includes a definition of champertors that appears in the printed copies, and which therefore

[292] Harding, *Conspiracy*, 97; George Sayles, "The Dissolution of a Guild at York in 1306," *The English Historical Review* 55 (1940): 83-98, 85). Sayles presents the issuing of the new ordinance of conspirators and the commission of trailbaston as simultaneous, and aimed at the same purpose, but gives no indication of any causal relation between them. See also 58 SS liv.

[293] Paul Brand, ed.,"Edward I: Parliament of 1305, Text and Translation," in *The Parliament Rolls of Medieval England*, ed. C. Given-Wilson et al., CD-ROM (Scholarly Digital Editions: Leicester, 2005), item 183.

can be a later addition, thus reflecting the belief that champerty and conspiracy are different offences:

Champertors be they that move Pleas and Suits, or cause to be moved either by their own Procurement, or by others, and sue them at their proper Costs, for to have Part of the Land in variance, or Part of the Gains	Campi Participes aunt qui per se vel per alios placita movent vel movere faciant;et ea suis sumptibus prosequuntur, ad campi patem, vel pro parte lucri habenda

The affirmation of the ordinance as the final Definition of Conspirators had led many commentators into believing that the purpose of the ordinance was to put an end to the uncertainty about the unknown substance of the offence of conspiracy and fix its meaning.[294] Considering that almost thirty years had passed between the first order to the justices in Eyre, and all the legislation and the case-law related to the writ of conspiracy, it would be more advisable to describe this ordinance as in the way of consolidation.

Indeed, these different bits and pieces, some statutory, some of judicial development, were combined and put together in this final Definition of Conspirators. Thus, part of the first clause relates to the order of the Eyre of 1278, to the ordinance of conspirators, and to the articles of the eyre:

33 Edw 1 (1305)	Order of the Eyre of 1278	Vetera capitula	Nova capitula	Ordinance of Conspirators (1293)
Conspirators are those who make alliances among themselves by oath, agreement, or through some other bond, that each will help and support what the other undertakes…		Of those by Oaths bind themselves to support or defend the Parties, Quarrels and Businesses of their Friends and well-wishers, whereby Truth and Justice are stifled.	Also of those who bind themselves by mutual Oaths, unjustly or justly to defend fraudulently Parts of Pleas or Suits affecting their Friends or Well-wishers, as in Assises, Juries, Recognizances, whereby they cannot be convicted in such	Concerning those who wish to make complaint about conspirators arranging for pleas to be initiated maliciously in the country, as brewers of discord, maliciously maintaining and sustaining those pleas and disputes at champerty or so that they might have some other advantage from it

[294] Winfield, *Conspiracy*, 33; 3 HEL 403. Cf. Bryan, *Conspiracy*, 20.

falsely initiating or supporting pleas,			Pleas or Suits according to the Truth	
Conspiratours sount ceux qui sentre alient par serment, covenaunt, ou par autre alliaunce, qe chescun eidra et sustendra autri emprise… , ou faussement mover plees ou meintenir,	quidam maliciosi homines de pluribus comitatibus regni nostri propter incrementum utilitatis proprie proniores ad malum quam ad bonum quasdam detestabiles confederationes et malas cogitationes, prestitis mutuo sacramentis, ad amicorum et benivolorum suorum partes in placitis et loquelis ipsos contingentibus in comitatibus illis utpote in assisis, iuratis et recognitionibus fallaciter manutenendas et defendendas, et ad inimicos suos fraudulenter grauandos, et in quantum in ipsis est plerumque exheredendos, inter se facere presumpserun	De hiis qui sacramentis se astringunt ad partes vel loquelas {negocioru[m]}a micoru[m] benevoloru[m] sustinendas vel defendendas, per q[uo]d veritas et justici suffoca[n]tur	Item de hiis qui mutuis sacrame[n]tis, injuste seu juste astringunt ad partes placito[rum] vel loquelaru[m],amic os vel benevolos tangent[er], fraudulent[er] sustinend[um] vel defendend[um], ut in Assisis, Juratis, Recognitionib	De illis qui conqueri voluerint de conspiratoribus in patria placita maliciose moveri procurantibus, ut contumelie braciatoribus placita illa et contumelias, ut campipartem vel aliquod aliud comodum inde habeant \maliciose/ manutenentibus et sustinentibus

The other part of the first clause codifies the extension of the writ to criminal proceedings, and was likely modelled on 13 Edw 1 c 12:

Ordinance of Conspirators (1305)	13 Edw 1 c 12

Conspirators are those who make alliances among themselves by oath, agreement, or through some other bond, that each will help and support what the other undertakes in falsely and maliciously indicting or causing to be indicted, or falsely acquitting, people… and also those who have children under age appeal people of felonies, through which they are imprisoned and greatly harmed	FORASMUCH as many, through Malice intending to grieve other, do procure false Appeals to be made of Homicides and other Felonies by Appellors… having respect to the Imprisonment or Arrestment that the Party appealed hath sustained by reason of such Appeals, and to the Infamy that they have incurred by the Imprisonment or otherwise
Conspirators are those who make alliances among themselves by oath, agreement, or through some other bond, that each will help and support what the other undertakes in falsely and maliciously indicting or causing to be indicted, or falsely acquitting, people… and also those who have children under age appeal people of felonies, through which they are imprisoned and greatly harmed,	Quia multi p[er] maliciam volentes alios gravare p[ro]curant falsa appella fieri, de homicidio & allis feloniis, p[er] appellatores nichil h[ab]entes… respectu ad prisonam vel arrestac[i]o[en]m, quam occ[asi]one huj[us]modi appello[rum] sustinuerunt appellati, & ad infamiam, quam p[er] imp[ri]sonamentum vel allo modo incurrerunt,

The clause extending conspiracy to those retaining other people to support their undertakings and suppress the truth relates to the petition we have seen of the people of London retaining clerks and royal officials.[295] The last clause concerning maintenance by Stewards and Bailiffs bears upon the Statute of Conspirators and 3 Edw 1:

Ordinance of Conspirators (1305)	Statute of Conspirators	3 Edw 1 c 33
and stewards and bailiffs of great lords who through lordship, office or power undertake to maintain or uphold pleas or disputes for parties, other than those which concern the estate of their	none of our Court shall take any Plea to Champerty by Craft nor by Engine; and [that no '] Pleaders, Apprentices, Attornies, Stewards of Great Men, Bailiffs, [nor any '] other of the Realm, [shall take for Maintenance or the like Bargain, any manner of Suit or Plea against other,]	no Sheriff shall suffer any Barretors {or Maintainers of} Quarrels in their Shires, neither Stewards of great Lords, nor other unless he be Attorney for his Lord, to make Suit, {nor} to give judgments in the Counties nor to pronounce the judgments,
et seneschaux et baillifs de grauntz seignurs qui per seigneurie, officie, ou poeir,	nul de n[ostr]e Curt enprenge play a champart, ne par art ne par engin, [Cunteurs ne atturnez ne	q[e] nul Visconte ne seoffre baretour meintenir pa[r]oles en Conte; ne Seneschaus de g[ra]nt Seygnurs, ne

[295] Paul Brand, ed.,"Edward I: Parliament of 1290, Text and Translation," in *The Parliament Rolls of Medieval England*, ed. C. Given-Wilson et al., CD-ROM (Scholarly Digital Editions: Leicester, 2005), item 48.

enpernent ameintenir ou sustenir pleez ou baretz pur parties, autres qe celes que touchent lestat lour	aprentifs, seneschaus des hautz homes baillifs ne autres de la [ter]re nenprengent a champart ne par autres barettours de] tute manere de play, [ou] tute manere de gent	autre sil ne seit attorne son Seygnur a suite fere ne render les Jugemen[t]s des Contez ne ponu[n]cier les Jugemen[t]s, sil ne seit especialment prie

It is true that saving the giving of fees and liveries, bribes are not explicitly mentioned in the new ordinance whether by champerty or any other arrangement. However, the articles of trailbaston recovered from the session held in Kent included inquests "de illis qui manutenent placita pro pecunia vel pro parte rei implacite habendo false et maliciose etc. et etiam de conspiratoribus et confederatis;" and also "de illis qui pro muneribus pactum fecerum et faciunt cum pacis Regis perturbatoribus et eos conduxerunt et conducunt ar ververandum vulnerandum et maletractandum etc., et etiam pro eo quod in assisis, iuratis recognittionibus et in inquisitionibus pro muneribus vel minis etc."[296]

Champerty is also mentioned in the statute 4 Edw II c 11 (1330) that would confer jurisdiction upon the justices of assizes over the crimes dealt with at the eyre:

ITEM, Where in Times past divers People of the Realm, as well great Men as other, have made Alliances, Confederacies, and Conspiracies, to maintain Parties, Pleas, and Quarrels, whereby divers have been wrongfully disinherited; and some ransomed and destroyed; and some, for fear to be maimed and beaten, durst not sue for their Right, nor complain, nor the Jurors of Inquests give their Verdicts, to the great hurt of the People, and {Slander} of the Law, and common right ; It is accorded, that the Justices of the one Bench and of the other, and the Justices of Assises, whensoever they come to hold their Sessions, or to take Inquests upon Nisi prius, shall enquire, hear, and determine, as well at the King's Suit, as at the Suit of the Party, of such Maintainers, Bearers and Conspirators, and also of them that commit Champerty, and of all other things contained in the foresaid Article, as well as Justices in	Item p[ur] ceo q[e] avant ces houres, plusours gentz du roialme, auxibien g[e]ntz, come autres, ount fait alliaunces, confederacies, & conspiracies, a meyntenir parties, pleez, & quereles, parount plusours gentz ount este atort desheritez; & ascuns reintz & destruz; & ascuns, p[ur], doute destre mahemez, & batuz, noserent pas seuyr lour droit, ne pleindre, ne les jurours des enquestes Io[r] verditz dire, a g[ra]nt damage du poeple & arerissement de la lei, & de c[e]oe droit ; Si est acorde, q[e] les Justices del un Baunk & del autre, & les Justices as assises prendre assignez, a totes les foitz qil vendront a faire lour sessions, ou a p[re]ndre enquestes, s[u]r Nisi prius, enqueregent, oient, & t[er]minent, auxibien a la seute le Roi, come a la seute de p[ar]tie, sur tieux meyntenours, emp[re]nours, & conspiratours, & auxint de Champartours, & des totes autres choses contenuz en dit

[296] Cam, *Hundred Rolls*, 75.

Eyre should do if they were in the same County ; and that which cannot be determined before the Justices of the one Bench or the other upon the Nisi prius, {for shortness of Time,} shall be adjourned into the {Place} whereof they be Justices, and there be determined as Right and Reason shall require.	article, auxiavant come Justices de eyre ferroient, sils fuissent en mesme le Countee; & ceo q[e] ne poet estr[e] t[er]mine devant les Justices del un Baunk, ou de lautre, s[u]r le Nisi prius, p[ur] brefte de lour demoer en pais, seit ajournee en Ies places dont ils sont Justices, & illoeqes t[er]minee, selonc droit & reson.

Furthermore, in the context of the trailbaston commissions, another petition was made to the king by the jurors of these sessions foreshadowing the later disqualification of conspirators to serve in juries and to appear in court. It stated that many people convicted of conspiracy or trespass appeared later and procured themselves to be put onto the inquests along with the people who had indicted them, and to confound them. It was provided that:

> With regard to conspirators, if they have made false alliances, in order to maintain falsehoods, or have procured to have themselves put on inquisitions before any officials of the lord king for some profit to be gained from this, so as to support a false party, or if they have received bribes from both parties for that reason, and are properly convicted of this before justices, or have freely acknowledged it before them, they are henceforth not to be put on any juries, inquisitions or assize.[297]

2.3.1 The Trailbaston in Action

The case of a guild of merchants at York taken by the trailbaston justices would illustrate how this new definition was put into practice. It was started by a bill of complaint brought before these justices at York in 1306. It should be recalled that this procedure had been first established in the Article Super Chartas. The jury found that certain people from that town had entered into a confederacy or conspiracy to have their disputes decided among themselves and not by outsiders keeping the profits thereof, to shift away the tax burden from themselves onto the poorer people of the city, and to support each other's pleas whether right or wrong as against those outside their guild. Thus, they formed the "guild brethren," appointed new officers in the city, and held secret conventicles and courts to determine their

[297] "De conspiratoribus, si ipsi fecerunt falsas consideraciones, ad falsitates manutenendas, vel procuraverunt se ipsos poni in inquisicionibus coram aliquibus ministris domini regis pro lucro capiendo, ea occasione ut falsam partem manuteneant, vel si munera ex utraque parte ea occasione ceperunt, et de hoc coram justiciariis rite convincantur, vel gratis coram eisdem hoc cognoverunt, decetero in aliquibus juratis, inquisicionibus, vel assisis non ponantur," Brand, *Parliament of 1307*, item 201.

causes. The defendants were adjourned to appear at Westminster where they were adjudged for the said confederacy and conspiracy that they should be imprisoned and heavily ransomed, and that the guild should be dissolved.[298] The convicted conspirators complained later to parliament that after having been "convicted before the council of a certain conspiracy and collusion", their fellow citizens refused to allow them to participate again in the city government to which it was responded that they should be restored to their previous status within the city.[299] Of these charges of corruption, only the last one properly fell within the purview of the new ordinance, though the other two can be said to be within the spirit of a law passed to empower the justices to deal with local corruption. The punishment resembles that provided by the Statute of Conspirators.

2.3.2 The Articles of the Eyre in Action

Before we move on to the next relevant piece of legislation concerning the disturbance of private right by corruption and barratry, a word must be said about how this issue was prosecuted through inquests on the chapters of the eyre. Unfortunately, other than the rolls of the Shropshire eyre of 1256,[300] I have not been able to check eyre records prior to the last ordinance of conspirators (1305). However, the records of the eyres of Kent (1313-14), London (1321), and Northamptonshire (1329) at the beginning of the reign of Edward II should suffice to give us an idea of what the prosecution of conspiracy as encoded in the article *De mutuis sacramentis* was like.

2.3.2.1 The Formula De Mutuis Sacramentis

In the indictments and verdicts that those cases resulted in, we can find different variants of the stereotyped formula of this article of the eyre. In (1313) YB 6 Edw II, Corone [6], 24 SS 62, the defendant had been indicted of "having conspired with others, under the bond of mutual oaths, to suppress truth and justice, etc." In (1313) YB 6 Edw II, Corone [6], 24 SS 62, the indictment was that the defendants "are conspirators and confederate together that each shall support the other in what action soever he may be maintaining." In *Rex v. Hackford, Depham, Hatfield And Others* (1321) 85 SS 40, the defendants were arraigned of

[298] Sayles, *Dissolution*, 85-89.

[299] Brand, *Parliament of 1307*, item 202. Sayles, *Dissolution*, 89.

[300] Alan Harding, *The Roll of the Shropshire Eyre of 1256* (London: Selden Society, 1981).

"conspiracy and of a false alliance to maintain as well the plaints of others as their own plaints, by an oath taken between them."[301] In *Rex v. Madefrei* (1321) 85 SS 51, the charge was that the defendant acted by "coven and confederacy with Thomas, parson of the Church of St. Nicholas Coldabbey, and of being bound by mutual oaths with him for maintaining both his own plaints and those of other men falsely and wrongfully." In *Rex v. Atte Swan* (1321) 85 SS 52, the charge was that the defendants "had been leagued together by mutual oaths to maintain all manner of plaints, without any consideration of falseness or of truth."

2.3.2.2 Malfeasance by Corrupt Officers

In some of the cases, the conduct under the articles involved frauds perpetrated by the corruption of local officers. The Mayor of London, John Gisor, was indicted of having made a conspiracy and confederacy by which he maintained the pleas of his confederates by delaying justice. He also was accused of having tampered with the register of the city to release on mainprise a suspect of homicide as a freeman thereof. He was found innocent "of the conspiracies or confederacies… [and] of any maintenance" but guilty of the latter.[302] Relating to the indictment of John Gisors, Robert Kelsey and others were charged with "having previously conspired together" and then tampering with the register of the city with the abovementioned purpose. Robert sustained that he was a common serjeant of the city assisting that felon the best way he could, and that he was not responsible for his release, which was the province of the mayor and other officers. The justices responded that this did not reply to the charge that he "conspired and plotted the fraud and malice above-said" referring to the tampering of the register.[303] Also in connection to this case, one Roger was also indicted for being a conspirator with Robert and for having taken money from a person

[301] Cf. The record JI/I/547A, m. 61d as reproduced on p. 42: "together with others, were bound by mutual oaths to maintain false plaints, and that each one of them would maintain the deed and enterprise of the other"; also, the Corpus MS., fo. 80 version, p. 42: "having been confederate together with others of the City of London, with mutual oaths that every one of them would maintain the plaints of the others, and if any one of them should take upon himself to maintain the plaint or the concern of any other many they would all diligently maintain that concern or plaint, justly or unjustly."

[302] *Rex v Gisors* (1321) 85 SS 47.

[303] *Rex v Kelsey and Others* (1321) 85 SS 50.

indicted of receiving felons before he was mainprised, although he was replevisable. He was found not guilty of the conspiracy, but they found that he had taken the money.[304]

2.3.2.3 Barratry

Barratry was another of the practices the justices of eyre expected to learn from through the inquests. In some cases, only legal and economic support of pending litigation was involved. In (1321) YB 14 Edw II, conspiracy [1] 85 SS 40, we have a case involving the disturbance of private right through barratry. Among other things, the defendants were indicted for having "confederate together with others of the City of London, with mutual oaths that every one of them would maintain the plaints of the others, and if any one of them should take upon himself to maintain the plaint or the concern of any other many they would all diligently maintain that concern or plaint, justly or unjustly." Thus, "by their wrongful false confederation and maintenance," they had taken the wardship of certain children under age, that is, they had supported the plea of one Roger, as part of the confederacy, as against the person who had the custody of the children. The defendants claimed that they were neither "confederated together nor bound by an oath or in any other manner to maintain false plaints or enterprises" in the city. They further added that they supported Roger "in good faith and not by evil confederation," and one of them said that he was "a near kinsman of the said heir, and therefore fully entitled to support that party,"[305] and that they had allied with Roger in that case "only by just means."[306] The court said that since "none who are strangers (to the litigants) ought to make any alliance to maintain a plaint, and (the jury) has found that you were allied together to maintain (as above), you are (liable) to judgment."[307]

Though it is not explicitly mentioned, it seems that by maintenance what was meant was giving counsel to one of the parties and probably countenancing attempts to influence the court. In that sense, it is interesting that they tried to defend good faith, and that the previous conspiracy in this context amounted to a collusion and evidence of an intent to defraud or deceive. It shows how a frame could be shifted for the purpose of legal argument:

---

[304] *Rex v Palmer* (1321) 85 SS 50.

[305] 85 SS 43.

[306] Ib., 44.

[307] Ib., 42.

within the frame of fraud, the intent to defraud is a central element. The court, however, did not think that fraud was relevant in the present case, where there was no intentionally crafted false plea but rather a dispute in which the defendants had interfered according to their agreement.

The facts in YB 3 Edw 1II, Corone [166] (1329) 97 SS 221 apparently contradict the principle according to which no alliance should be made to maintain a party. The plaintiff, having agreed to maintain by champerty, did not complain that the defendants did the same, but of a form of fraud which was the ambidexterity or taking money from both sides.[308] In his count, the plaintiff explained that, whereas "he was unable to maintain his suit alone without help from others who were greater than he," in an action of formedon he had made a covenant with two others that "they would aid him in maintaining the aforesaid suit and they would pay expenses so that he could recover the two messuages, and that after he had recovered the two messuages he would enfeoff them." And to secure the performance they entered into a bond that they would pay a certain sum, and that he would enfeoff them of another messuage, on condition that once he had recovered the two messuages he would return the money, and they would return his messuages. Then, he complained that the defendants turned on him and "by confederacy and conspiracy between them, adhered to the adverse party and abandoned Geoffrey's suit and took a feoffment of both the messuages from the person against whom the writ was brought." Geoffrey tried to have his messuage back, but they refused. The defendants argued that this was an action of "champarty" which was available only to tenants, and that, in all events, conspiracy could be brought by writ and indictment only but not by bill as the plaintiff had done. Scrope CJ laid down that champerty can be punished only at the king's suit, and agreed with the defendants that conspiracy could only be brought by writ or indictment. The justice was apparently oblivious of 28 Edw 1 c 10, which enabled complainers to bring bills of procedure before itinerant justices. The argument about champerty also shows that as late as 1329, it was an offence only committed by corrupt royal officials though there were already suggestions that there may be an action as well.

[308] For another case of ambidexterity see YB 6 Edw II, Corone [6] (1313) 24 SS 62.

There were also cases of barratry by bringing and arranging false pleas to extort others for profit and corrupting local officials. In *Rex v Parson of St. Nicholas Coldabbey* (1321) 85 SS 48, 49, the parson, along three others, was indicted for being "bound by mutual oaths for the maintenance of false pleas," and for being "a champertor, in making a profit from such false pleas." The jury found that he "was bound… for the maintenance of false plaints and that he is a common maintainer of false pleas." They also found that one of them, being a bailiff in the city and "wishing to oppress the people by getting gain from them" had had people attached to answer before court "and extorted large sums of money from them unjustly, of his own malice and deed." It was further established that the parson "was a maintainor [sic] of such pleas in the said court… for the extortion of money in this matter, and was a champertor of the fines and amercements." Likewise, in *Rex V. Madefrei* (1321) 85 SS 51, Madefrei was charged with "coven and confederacy" with the said parson, "and of being bound by mutual oaths with him for maintaining both his own plaints and those of other men falsely and wrongfully."

The case of *Rex v Atte Swan* (1321) 85 SS 52 was concerned not only with barratry by false suits to extort money, and the corruption of local officers, but also with embracery. In this case, Henry, a bailiff, and Thomas, a parson, were indicted for being "leagued together by mutual oaths to maintain all manner of plaints, without any consideration of falseness or of truth." They both "had involved divers persons in pleas before him, by the abetment and counsel of the said Thomas, so that they might be able to take (money) from both parties (to the plea)." It was also claimed that Henry "falsely procured a certain inquest to be made… and that by his procurement" the defendant was sentenced to pay damages. All this was established by the jury, who also found that Henry had unjustly distrained people to compel them to come before him so that "by his malice and deed he, together with the said Thomas and others, might extort money from them."

In addition to these cases of extortion, a case of wrongdoing in the way of vexation by bringing a false suit and fraud was *Arnald v Brandon and Bery* (1321) 86 SS 127. In this case, the complaint was that the defendants had brought a writ of account in the name of another person by which the plaintiff had been imprisoned, as a consequence of which he lost a pending plea of mayhem.

Another case involving the interference with juries was (1313) YB 6 Edw II, Corone [205] 24 SS 145, where presentment was made that the defendants, "together with other conspirators, procured the dozen of Ruxley to conceal" offences to the Eyre justices. Indeed, these Eyres sometimes produced some awkward situations. In *Rex v Hackford, Depham, Hatfield and Others* (1321) 85 SS 40, the jury of presentment was made of people who belonged to the other local faction than that of the defendants. On being challenged, members of that local faction who were present approached the coroners who had to choose other jurors. Later, members of that jury would themselves be indicted for conspiracy by the other faction, and some of them would refuse to put themselves before the country on the grounds of bias (85 SS 46).[309] In *Rex v Refham and Others* (1321) 85 SS 51, 53 on the summons of the eyre, the defendants "made an assembly at the Leaden Hall on Cornhill, and leagued themselves together mutually to maintain the confederacy made previously… to confound the trusty and to conceal the truth, so that transgressors should not be punished in the Eyre aforesaid."

These cases reflect the concern of the eyre with the corruption of local government, of which judicial corruption was only a part. Consequently, the concept of conspiracy to maintain was sometimes expanded to include other aspects of local politics. Thus, in (1321) YB 14 Edw II, conspiracy [1] 85 SS 40, the defendants, who belonged to one of the factions of the city, were indicted not only with conspiracy to maintain maintenance but also of tampering with the election of local officials so that "by their confederation and enterprise they have so great a mastery that no such election can be held in these days except according to the will of the aforesaid William of Hackford and his other fellow maintainers." And also, "when an aid was to be levied in the City for the use of the lord King this aid was assessed by the said William of Hackford and the others confederated with him so that their confederates should be spared and others of the City oppressed." Naturally, the other faction was indicted for assessing taxation and tallage so that "whoever they wished to elevate or oppress might be tallaged by them accordingly, keeping the third penny of every collection for themselves" (*Rex v Waltham* (1321) 85 SS 49). Thus, it makes perfect sense that when prosecuted for the king in the context of the eyre, conspiracy was seen as an offence not only

[309] Cf. Brand, "Parliament of 1307," item 201.

against the peace, but also aimed at "the perversion of justice," (24 SS 145, 146) or "the fraudulent deception of the lord King and against his Crown and dignity, and to the destruction of the middling people" (85 SS 51, 53).[310]

2.4 Making Good Friends

2.4.1 The Fraternizing Model of Mutual Protection and Aid

Having discussed the development of the law of conspiracy during the reign of Edward I, we should turn now to the frame which was evoked in the use of such terms as *conspiracy, confederacy, maintenance*, or procurement: the fraternizing model of mutual cooperation.

Mutual self-help is a derivative form of cooperation. Cooperation entails a group of people working together with a joint intent or engaging in a course of conduct or undertaking with a common or shared purpose.[311] By contrast, mutual help or helpfulness involves that "the goal is shared only through the relationship of the helper to the individual whose goal it actually is. The emphasis is on the relationship to that individual, not upon the goal itself."[312] What characterizes this form of cooperation is that the common goal is not to complete a task by a division of labor, or to bring about certain effect by aggregate individual action but to support or aid each other's individual interests or needs as they arise. This, however, does not preclude the possibility that by virtue of that bond of self-help these people might also engage in purely cooperative tasks or in certain coordinated conduct with a shared purpose in mind.

According to this model, when people engage in mutual cooperation they do so because they are tied together to mutually support each other by a form of personal association or relation. That means that they have to cooperate with each other, and that they have to provide for each other by virtue of this bond. When a person thus bound demands cooperation from another to advance their goals or interests or to provide for their needs, that

[310] As argued earlier, this being considered as an offence against the public is not the reason why the offence received the name of conspiracy, which was rather a linguistic accident.

[311] Cf. Mead's definition as "the act of working together to one end" Margaret Mead, Introduction to *Cooperation and Competition Among Primitive Peoples*, ed. Margaret Mead, 1-19 (New York; London: McGraw-Hill Book Company, Inc., 1937), 8.

[312] Mead, *Introduction*, 17.

person is asking for help or assistance by virtue of this existing bond between them as members of a group. In other words, that party is *procuring* the party bound to him to do something for him. When someone cooperates, or works together with another toward advancing that person's goals or interests or providing for their interests, this person is helping or supporting the person asking for assistance by virtue of this bond, as members of the same group. In other words, that party is *maintaining* the party to whom it is bound. It follows that within this frame only people bound together can ask each other favors, and help each other.

In traditional societies, these ties and personal relations that make possible mutual cooperation are created by means of what has been called the *fraternization contract*, that is, a status contract that changes "the social status of the persons involved." Thus, these contracts are means for one person to "become somebody's child, father, follower, vassal, subject, friend, or, quite generally, comrade." By contrast, the *purposive contract* does not "affect the status of the parties nor… [give] rise to new qualities of comradeship but… [aims] solely, as, for instance, barter, at some specific (especially economic) performance or result." Particularly, these contracts made the person "something different in quality (or status) from the quality he possessed before. For unless a person voluntarily assumed that new quality, his future conduct in his new role could hardly be believed to be possible at all. Each party must thus make a new soul enter his body." That is why, at an early stage, this *fraternization contract* involved the performance of magic rituals that symbolized the creation of this new soul.[313] It would be the oath or "a conditional self-curse, calling for the divine wrath to strike" the parties contracting in case they fall into anti-fraternal conduct what constituted "the most universal of all fraternization pacts."[314]

Mutual defense and assistance associations created through these fraternization agreements became very common in Early Medieval Europe. These could be temporary associations as those involving merchants in a voyage who came together to defend the vessel

[313] The Bachiga of East Africa, for instance, seal their pacts of ritual blood brotherhood by swallowing a little of each other's blood in the belief that breaking the oath will cause the blood to swell up and kill the transgressor; Mead, *Introduction*, 128.

[314] Max Weber. *Economy and Society*. Edited by Guenther Roth and Claus Wittich. Vol. 2. (Berkley; Los Angeles; London: University of California Press, 1968), 672-673.

in case of attack.[315] But they could also be permanent life associations as the guilds which bound their members to defend each other against aggressions as well as to assist each other in economic hardship or in legal affairs as by acting as oath-helpers.[316] The medieval commune also originated as a sworn association for the mutual defense and assistance of its members but linked to a location.[317]

The fraternization ritual by which these self-help associations were born was the exchange of mutual oaths or *conjuratio*. Another fraternization ritual that is very important to our purposes is that of the *conspiratio*.[318] We see this ritual in early Christian liturgy as the mouth-to-mouth kiss "by which the participants shared their breath or spirit with one another," and symbolized "their union in one Holy Spirit, the community that takes shape in God's breath" creating a "fraternal spirit in preparation for the unifying meal."[319] In the Middle Ages this ritual of the kiss was used alternatively to the oath in status contracts. For one thing, in France the ceremony of homage included the kissing on the mouth of chief and subordinate "symbolizing accord and friendship."[320] and therefore mutual loyalty[321]. And in England there are examples of this equalitarian ritual being performed as a part of subinfeudation deals. In 1247 an promise to give a daughter with a fourth furlong of land was backed with a kiss,[322] and in 1341 after doing homage to their new lord both a husband and his wife kissed him.[323] Indeed, in the Middle Ages, it is not infrequent to find both rituals combined, particularly in the formation of guilds and the organization of political plots.[324]

---

[315] Carsten Müller-Boysen, "Factors for the Protection of Merchants in Early Medieval Northern Europe," *Journal of the North Atlantic* 8 (2016): 210-215, 211.

[316] Mead, *Introduction*, 211-212.

[317] Otto Gehard Oexle, "Peace through Conspiracy," in *Ordering Medieval Society*, ed. Bernhard Jussen, 285-322 (Philadelphia: University of Pennsylvania Press, 2001), 288.

[318] Conspiratio, in *Thesaurus Linguae Latinae*, ed. by Deutsche Akademie der Wissenshaften (Leipzig; Munich: B. G. Teubner; K. G. Saur Electronicc Publishing, 2006 [1906]).

[319] Ivan Illich, "The Cultivation of Conspiracy," in *The Challenges of Ivan Illich: A Collective Reflection*, ed. Lee Hoinacki and Carl Mitcham, 233-242 (New York: State Univertisy of New York Press, 1965), 240.

[320] Marc Bloch, *Feudal Society*, vol. 1 (London; New York: Routledge, 1965), 146, 162.

[321] Ib., 228.

[322] *Walter v William Thomas* (1247) cit. in HCL 53.

[323] (1341) YB Mich 15 Edw III, pl 70.

[324] Robert Fredona, "Political Conspiracy in Florence, 1340-1382" (PhD Diss., University of Cornell, 2010), 12, 38, 109.

Thus, in the Middle Ages, both *conjuratio* and *conspiratio* are used indistinctively to refer to associations or personal bonds created by oath to provide mutual aid and protection against other people, particularly to those characteristic forms of association by oath which were the guild and the commune.[325]

The language which codified the fraternizing model of mutual assistance and protection against enemies comes mainly from the legal field. Thus, the language used to describe the frame of these fraternization contracts betokens the civil and religious authorities' attitude towards them as reprehensible conducts. The frame can be defined as taking place when two or more people promise each other to help or aid each other against their enemies, consent or agree to each other's promises, and perform a fraternization ritual which might include both oath and mouth-to-mouth kissing. Words encoding the formal aspects of this mutual help agreement are *alliance, confederacy, conjure,* or *conspiracy*. Though the ritual of mutual oath taking is properly speaking the *conjure,* by metonymic extension the other words originally designating other rituals and/or covenants came to mean the same agreement by oath to mutually support and defend each other.

As mentioned above, these associations of self-help can be permanent or temporary. Temporary associations are formed with a view to deal with some specific issue, usually an imminent problem, for which eventual assistance and support is needed.[326] In this case, words encoding the substantive aspects of this agreement, the plan or course of conduct that is expected to be engaged with to deal with the specific matter, and in fulfillment of this goal of supporting each other are *scheme, design, machination, practice, covin, collusion,* or *plot.*

---

[325] Oexle, *Peace Through Conspiracy*, 288-291, 304. See also Illich, *Cultivation of Conspiracy*, 241. In the Early Middle Ages, they also took the name of *convenientiae,* a term which embraced extrajudicial agreements as well*;* Patrick J. Geary "Extra-Judicial Means of Conflict Resolution ." In *La giustizia nell'alto medioevo (secoli V-VIII)* (Spoleto: Centro italiano di studi sull'alto medioevo, 1995), 583-585. The two main senses of the lexeme *conspiratio* in the TLL are "consensus, concordia, coniunctio, societas" and "coniuratio, tam privata (inimicorum, accusatorum sim.) quam publica (civium in rem publicam, hostium contra Romanos sim.)" (conspiratio n. d.).

[326] In 1378, in Florence, a group of people who had been involved in robberies and feared an imminent arrest by the public authorities gather together and planned to cause a riot the next day in order to avoid the arrest, and then "con grandi sagramenti e leghe si legorono insieme e bacioronsi in bocca d'essere alla morte e alla vita l'uno coll'altro e difendersi contro a chi li volessi offendere; e dierono ordine d'andare a tutti e loro pari, per li luoghi e contrade dove dimoravano, a dare il sagramento e ricevere promessioni; e ferono certi sindachi, che questi fussino e stessino avvisati e attenti, che, se a nullo fussi fatto villania o ingiuria, d'essere tutti in difesa di quello tale," Fredona, *Political Conspiracy*, 110, n(198).

Sometimes these agreements are preceded by a discussion and deliberation about what course of conduct should be taken, which is encoded in words such as *consultation* or *conference*. Again, by metonymic extension, the words used to describe the agreement by oath could describe the planned conduct or the deliberation and vice versa.

Sometimes, this fraternization contract does not take place in advance, but on the spot as many people gather together to defend themselves against an imminent attack or aggression or to take immediate action against their common enemy.[327] Words describing such gatherings with the purpose of self-help in which the people meeting enter into a temporary alliance with each other are *conventicle, congregation, coadunation* or *assembly*. By metonymic extension, the words used to describe the agreement by oath can refer to the meeting and vice versa.

2.4.2 Fraternal Agreement and Litigation

In traditional societies, it has been a well-established principle that parties other than the litigants or the judicial officers must not interfere with legal procedure. Only those who either have a personal interest in the case or have a personal relation with any of the litigants can come to court or otherwise act in their assistance. This included kinsmen, friends and followers who by virtue of their personal relation were indeed bound to help them. We can see this principle of family or group solidarity that dovetails with the principle of no interference in litigation in the medieval compurgation, or in the duty that compels the kin of the victim to appeal the offender, or in the method of collective liability of the suretyship that made the members of a tithing responsible for each other's appearance in court to respond for a crime. We can also see this principle in the fiction that the Roman advocate was giving his services gratuitously because of a personal connection with his client rather than because of a fee which could not be officially charged.[328]

If we interpret the articles of the eyre and the statutes on conspiracy in light of these twin principles, it follows that they refer to unlawful fraternizing agreements justifying the

[327] We see examples of this behavior in the Italy of the *communi*. In 1343, leading families of Florence gathered together with the popular classes of the city to repeal an imminent attack by the Duke and "si giurarono insieme e baciarono in bocca," Fredona, *Political Conspiracy*, 38.

[328] Max Radin, "Maintenance by Champerty," *California Law Review* 24 (1935): 60.

interference of third parties in the legal business of other people. In other words, it is possible that to avoid being disqualified from appearing in court, or assisting parties in their disputes, people who did not belong to the nascent legal profession entered into this fraternizing agreements to help or maintain their friends against their enemies. This idea was expressed by the parson of Souldern who, on the accusation of interfering in other people's causes, and encouraging them to bring litigation, argued that "it is lawful for everyone of the realm to help his friends in their rights in the lord king's court etc. or to advise etc. against their enemies."[329] In *Rex v. Hackford, Depham, Hatfield and Others* (1321) 85 SS 40, one of the issues was whether the defendants had unlawfully maintained a party to a case concerning the wardship of two children. One of the defendants explained that he had assisted his wife because "I was a party along with my wife, who could not be received (to plead) without me." Another said that "Peter says that he is a near kinsman of the said heir, and therefore fully entitled to support that party in justice." For Herle J, this was "an alliance of parentage and of affinity". Stanton J laid down that "none who are strangers (to the litigants) ought to make any alliance to maintain a plaint."[330]

A prospective litigant would seek the synergies from other parties that may assist them in the management of the suit. There are plenty of tasks that would require the cooperation of other parties such as helping to secure the presence of witnesses, buying and serving processes, paying expenses or informing juries of the facts, not so speak of giving counsel. It is all but natural that to avoid the principle of non-interference they would enter into these fraternizing agreements that would allow them to "make many friends and of the best" (Bellamy, Bastard Feudalism and the Law 1989, 58). Yet at the same time, the management of litigation could also involve unlawful activities apart from the interference, such as the bribery of officers and jurors, not to speak of the invention of false suits and the fabrication of evidence. Thus, in the words of the writ to the justices in eyre of 1279, what rendered such fraternizing agreements in support of friends against enemies unlawful was that they were "propter incrementum utilitatis proprie proniores," and that they were "ad

[329] 58 SS 22, 23.

[330] 85 SS 40, 42.

malum quam ad bonum," that they were "fallaciter… [et] fraudulenter grauandos… plerumque exheredendos."

It is important to realize that the problems of the interference of third parties in the legal process, and that of judicial corruption and barratry, were combined within the same legal framework. Thus, the terms of the fraternizing frames such as *conspiracy*, *maintenance* and *procurement* became catchall terms to refer to barratry, corruption, fraud and the many wrongs and infringements that were brought about by means of these conducts.

2.4.3 Bastard Feudalism and the Management of Litigation

A final aspect that bears on the medieval conspiracy is its connection with the culture of bastard feudalism, and how it might explain why the law turned against the fraternizing agreements in litigation.

Land feuds played a prominent role in the lives of the landed classes of later Medieval England. These disputes were settled using two strategies that were often complementary: litigation and force.[331] The former was an expensive and uncertain proposition to be left to the courts. That's why litigants tried to secure success by careful litigation management which involved several practices taking place in a grey area where the legal could easily become illegal.

Among the things that fell within the legal side of this grey area was what contemporaries called laboring: laboring witness and jurors. As for the former, litigants were expected to seek favorable witnesses and to secure their appearance, but they were probably not allowed to couch them.[332] Regarding jurors, the parties could inform them about their respective merits before trial,[333] they could pay for their expenses at their request[334], and the successful party was supposed to pay a "juror's dinner," after the case was decided.[335] However, these practices could easily turn illegal. A party approaching a juror to inform him

[331] J. G. Bellamy, *Bastard Feudalism and the Law* (London: Routledge, 1989), 33, 35, 76, 78.

[332] Ibidem. 62.

[333] Ib. 28, 66.

[334] Ib. 28, 67.

[335] Ib. 71.

could also bring pressure to bear by letting them know who his protector was, or instead addressing the social superiors of the jurors if they could be approached.[336] The illegality was more flagrant when they prevented the jurors from coming to trial to cause a delay or they attempted to bribe them, sometimes at their request.[337] But the most common strategy perhaps, and the one that made authorities most uneasy, consisted in attempts at packing juries with persons either akin to one's affinity or to one's master's affinity, or had any connection whatsoever to any of the parties.[338]

Obviously, this practice involved further illegal activity as it required meddling with the officer who held the keys to the jury: the sheriff[339]. This could be accomplished by means of direct corruption or bribery.[340] We are told that, as members of the gentry, sheriffs were probably already a part of one or another faction in the county, which was a signal for the lucky ones "to bring suits against a number or rivals and oppressors."[341] In addition to this enormous power to tilt litigation and criminal prosecution one way or the other, sheriffs could also take advantage of their office at the request of an ally, or after some bribe, to delay legal proceedings and vex and harass the other party by failing to serve a writ,[342] by arresting or fail to arrest someone, by levying fines and allowing unauthorized bails.[343] Similar effects could be pursued by resorting to court clerks and by making friends and allies, or people eager to make a profit or to secure a position, counter sue.[344] Likewise, the office of the JPs

[336] Ib. 66-67. Sometimes words were not even necessary. The mere sight of the livery had an intimidating effect on jurors, ib. 26. Likewise, a forcible entry in the land will signal that "the entering party was a force to be reckoned with in county politics and not to be crossed lightly," ib. 40. In criminal law, grand juries were most reluctant to accuse "great men or their clients" of misdemeanors like riot, ib. 25.

[337] Ib. 28, 68.

[338] Ib. 25, 28, 64. This was one of the grounds for challenging the impaneling of juries, ib. 65.

[339] Ib. 14, 17.

[340] Ib. 17.

[341] Ib. 15, 64.

[342] Ib. 13.

[343] Ib. 30.

[344] Ib. 38, 53, 57, 59.

was another place from which to defend one's allies, particularly in securing that prosecution for riot did not proceed.[345]

What transpires from these practices in which litigants got involved is that litigation management could not have been possible without tapping into one's social resources, "a man's relationships with his lord, his friends, his clients, his tenants and servants, the possibility of outside backers, and the disposition of such important local officials as the sheriff."[346] Without cooperation from external parties, the management of litigation was to a great extent ineffective and the odds of success became thinner, if not impossible, when the other party did have the backup of other people. As one defendant put it, the "best protection when there was a writ of novel disseisin out against him was to 'make many friends and of the best."[347] Litigation within the context of the late medieval land wars was a social matter in which parties relied on networks of mutual assistance. This is as much to say that the court was one of the places in which the so called bastard feudalism became more visible.[348]

Bastard feudalism could be narrowly understood as designating a form of feudalism in which the service indenture contract has superseded the early medieval homage, and the fee or the promise of a future benefit or support has displaced the fief. In a broader sense, it refers to a social order emerging out of this new social relation between master and client, as opposed to the social order emerging from land tenure. Regarding the latter, I am aware that the historiography of the bastard feudalism has been entangled in debates about the opportunity of this label, about whether this was weaker a bond that that between lord and vassal leading to a much more unstable social arrangement, and about the vexed question of the origins of bastard feudalism, and of whether the Anglo-Norman England did not show similar patterns of behavior. To our purposes, it is a useful way to describe the arrangements that lay behind the offenses relating to the management. Furthermore, taken in its broader sense as a social order, nowhere is the mutual interclass cooperation between lesser nobility and magnates, and gentry and commoners, better exemplified than in the court room.

[345] Ib. 18, 24.

[346] Ib., 42, see also 5.

[347] Ib. 62.

[348] Ib. 37.

What were these networks of mutual interclass cooperation like? The simplest example of this idea lay at the apex of the social hierarchy: the great lord's affinity, the network of people who were bound to the lord either as his allies, his retainers, or as his household servants, and as his tenants. This bond entailed mutual assistance. The social inferiors were expected to "'help him forward', that is to say, increase his family's wealth and prestige." Among other things, in the case of what we could properly call his clients, retainers and associates, this implied things like what has been described as laboring the jury, which was an activity that the lord was not supposed to do himself, and that might involve more things than simply informing and trying to persuade the jury of the rightness of a claim.[349]

On the other end, the members of the affinity, particularly the lord's clients, expected his protectors to help him in the management of litigation. This could be done by direct intervention of the lord, or simply by letting it be known that he was under his protection. Likewise, the lord was expected to arbitrate quarrels between the members of the affinity and "instruct them not to resort to direct action or the law courts." Furthermore, the lord would provide for offices in his administration or broker the client's candidacy to a royal position.[350] Sometimes, clients tried to secure this *good lordship* through bribes or the promise of sharing the spoils of litigation with their lord, and it is to be presumed that the lords rewarded their clients the same way.[351]

In sum, we should presume that this modus operandi at the upper echelons of late medieval English society was reproduced by the lower ones. For one thing, these on the lower echelons would always be members of some affinity, and as such linked to other people through these ties of mutual help. But, presumably, they would forge similar bonds with people below them. And at the lowest level possible one could always count on the kin and the closest family for help in litigation. Not to mention that those commoners, who dwelled in the ever-growing in importance towns and cities, resorted to similar strategies to manage their disputes and conduct the life of the city.

---

[349] Ib. 95-96.

[350] Ib. 95.

[351] Ib. 96.

2.5 The Narrowing of Conspiracy

As discussed above, during the reign of Edward I, the disturbance of private right, vexatious litigation, extortion, and wrongful prosecution by corruption and barratry were crammed into the law of conspiracy as expressed in the Definition of Conspirators. This wide scope may explain the popularity of the writ of conspiracy which, only in a single term in 1297, counted no less than fifty-three actions in the King's Bench.[352] Inevitably, such success came hand in hand with abuse of the writ, particularly as a means to intimidate and get back at indicting jurors after their acquittal.[353] Alarmed that it might discourage people from serving as jurors, the authorities discontinued the issuing of the writ of conspiracy for a while, but this was throwing the baby out with the bathwater.[354]

Slowly but surely, the courts narrowed the scope of both the civil action and the criminal proceedings from its high-water thirteenth-century mark. The process was long, overarching the fourteenth and fifteenth centuries. Though far from attending to chronological issues, Winfield's scrutinized and digested this late medieval case-law and that excuses giving any detailed account thereof here.[355] To our purposes, suffice to take a quick gander at the destination point of this journey to see how differently early modern lawyers understood conspiracy compared to the way their Edwardian counterparts would have explained it.

To begin with, for the first time since the Edwardian statutes, we have abstract substantive definitions of the wrong of conspiracy as opposed to the fact-laden accounts of the *books* and the writs. Fitzherbert states that:

> A Writ of Conspiracy lieth where two, three or more Persons of Malice and Covin do conspire and devise to indict any Person falsly, and afterwards he who is so indicted is accquitted, no he shall have this Writ of Conspiracy against them who so indicted them. But this Writ lieth against two Persons at the least who do so conspire; for if one Person of Malice and false Imagination do labour and cause another falsly to be

[352] 58 SS lxi.

[353] Mirror Bk 5, c 1; 58 SS lxxi; Bellamy, *Bastard Feudalism*, 34; Winfield, *Conspiracy*, 21.

[354] (305) YB Pasch 33 Edw 1, Note; 57 SS lxxxv.

[355] Winfield, *Conspiracy*, 29-115.

> indicted, the Party who is so indicted, shall not have a Writ of Conspiracy, &c. but an Action upon the Case against him who caused him falsly to be indicted.[356]

And also, that "a Writ of Conspiracy doth not lie against the Indictors."[357]

Staunford explains that "al comen ley, cest brief gisoit auxibien in acquital sur appel, coe il fait a cest iour in acquital sur enditement," that "cestuy qui serra charge in conspiracy, duis estre charge que il ceo fist faulxement & maliciousement sans ascun bo[n] ou droitful foundation," and that "conspiracy ne peut estre commise p[ur] un person solement, eins deux al meyns, & pur ceo cel action ne voet estre maintenus vers un solement."[358] Furthermore:

> Si apres le conspiracy, les conspiratours sount iures sur lenquest del inquerie des felonies, & ills ove le remenant del enquest queux son iures ove eux, enditont cestuy vers qui ill on conspire de felony in cel case nul briefe de conspiracy gist vers eux, eo que ne peut estre intendu falx ou malicious quaunt ils ceo font par vertu de lour serement, & ceo ove auters que eux mesmes.[359]

Coke defines it this way:

> Conspiracie is a consultation and agreement between two or more, to appeale, or indict an innocent falsely, and maliciously of felony, whom accordingly they cause to be indicted or appealed; and afterward the party is lawfully acquitted by the verdict of twelve men: the party grieved may be relieved, and the offender punished two wayes. First, by a writ of conspiracy, which is a civill or common action at the suit of the party, wherein the plaintife shall recover damages, and the defendant shall be imprisoned. Secondly, by indictment at the suit of the king, the judgment whereof is criminal.[360]

Les Termes, by contrast gives a terse definition, according to which:

> *Conspiracie* is a writ and it lyeth where two or more knit themselues together by oth, couenant, or other maner of aliāce, that euery one shall helpe other for to indict or appele any man of felonie, then hee which is by such maner indicted or appealed shall haue this writ, But this writ lieth not against the indictors."[361]

---

[356] FNB 14 D.

[357] Ib., 15 B.

[358] Staunford PC, Liber 3, 172 A, B; 173 E

[359] Ib., 173A, B)

[360] 3 Inst 143.

[361] John Rastell, *An exposition of certaine difficult and obscure words, and termes of the lawes of this realme...* (London: Printed by th'assignee of Charles Yetsweirt Esq. deceased, 1595 [1536]).

In these definitions, both the scope of the civil action and the offence of conspiracy had been restricted to wrongful prosecution. There is no word about the application of conspiracy to civil proceedings in either Staunford, Coke, or Les Termes. Fitzherbert has something to say: he believes that "there are divers other Writs of Conspiracy grounded upon Disceit, and Trespass done unto the Party, which are properly Actions of Trespass upon the Case" (FNB 116 A) as "against those who conspire to forge false Deeds which are given in Evidence by which Land is lost." (FNB 116 D). He takes conspiracy properly to mean wrongful prosecution, and what once was a huge part of it, is now a different form of action. This oblivion may be explained by the fact that, during the fifteenth century, the writ of conspiracy as applied to civil litigation was likely superseded by other remedies such as *decies tantum*, deceit, and *audita querela*, thus falling out of use.

The other elements of the modern writ of conspiracy have to do with the restriction of its use. The acquittal requirement is not really new, as we have seen, but the plurality requirement, that is, that conspiracy is not actionable against a sole defendant, and the immunity of the indicting jurors are. It should be noted that Fitzherbert, Staunford, and Coke emphasize malice aforethought and the absence of justification, but this was probably the consequence of the action on the case about which Fitzherbert talks. We will come back to this later.

3. The Will for the Deed

Before we move on to the rise of the modern law of conspiracy, we should stop to discuss the development of another doctrine that would play a very important role in this process. I am talking about the doctrine expressed by the apothegm of *the will for the deed.*

This apothegm is normally used to refer to the subjective conditions of criminal liability in relation to what we would call today an attempt. But we should be careful not to project the present onto the past. As it appears at the time, it cannot be considered to express a substantive offence, nor does it hint at a general theory of attempts. Rather, the use of this apothegm is highly contextualized. It normally occurs within the domain of homicide to refer to special forms of homicide that do not fit within the core of this category. To put it in other words, contemporaries do not think of the attempt to commit homicide as a substantive offence, but rather, in distinguishing different forms of homicide, they talk about the homicide by attempt; what they would call the homicide in will.

This theory of the homicide in will is important to the development of the law of conspiracy because, as we will see, a false accusation could be considered as such. And that view opened the gates to considering a failed false accusation as a homicide by attempt. But it is also important because the scholars that will be discussed in short prompted a curious form of conceptual blend by reframing the uncomfortable formulation of the first form of high treason: compassing or imagining the death of the king. Under this interpretation, what this first treason would punish would be a form of homicide by attempt. But this would mean bringing part of the category of treason within the periphery of the domain of homicide. It would be a homicide by attempting to kill the king. This intellectual operation may seem irrelevant, but reframing this treason as a form of homicide leads to think of the conduct less in exceptional terms and more in the same terms that would apply to the conviction of homicide; less like treason and more like regicide.

I should also mention that within the domain of treason, the expression *the will for the deed* itself is all but unambiguous. There are at least two main meanings that arose at the time. The hard version would be that intent in itself is the punishable element in crime, and

that the subsequent action is but evidence of it. The softer one would be that in considering the form of liability a failed homicide, intent must be considered rather than the action itself.

Finally, the discussion of this reframing of high treason also implies attesting changes in the semantic structure of *conspiracy*. As it happens to be, the fraternizing agreement was one of the central parts of the political intrigue as these people bound themselves against their enemy, the king. By metonymic extension it came to be used to mean stages of the meeting and plotting of it, if not political intrigue itself. This way, the term *conspiracy* would become linked to the frame of the homicide in will as well as that of wrongful prosecution. In this sense, I will also discuss other uses of the term *conspiracy* within the frame of treason which were consequential for the development of the law of conspiracy after the fall of the Star Chamber.

What follows is an analysis of the lexical and semantic structure that expressed these ideas among the main theorizers of high treason, with a focus on the term *conspiracy*.

3.1 Homicide in Coke

According to Coke, the category of 'homicide' can be defined as "*hominis caedium"* or "*hominis occisio ab homine facta*,"[362] that is, the 'killing of man by man' or 'death by man'. Sometimes Coke uses *to slay* as a synonym for *killing*,[363] and both terms with the meaning of 'to cause to die.'[364] This latter definition entails an action and a consequence that can or cannot follow such action. In other words, to kill somebody is not to engage in a, clearly defined action, but to produce or bring about the effect of the death of man. This can be clearly effected by innumerable conducts, many of which need not bring about such effect.

The structure of this category which "comprehendeth petit treason, murder, and that which is commonly called manslaughter"[365] is primarily organized around several qualities that can be predicated of the agent or subject of the 'killing', and eventually, in the periphery, concerning the patient or victim of the killing. More specifically, these qualities refer to the

[362] 3 Inst 55.

[363] Ib., 47, 52, 53, 56.

[364] Ib., 57, 48.

[365] Ib., 48.

state of mind of the person causing the death. But as we will also see, they also bear considerations as to the nature of the conduct of killing.

3.1.1 The Frame of Homicide

Given the genus of homicide as 'killing,' the structure would be organized respecting a series of subjective distinctions made concerning the defendants, that is, the agent of the killing, and another set of distinctions concerning the circumstances surrounding the killing.

3.1.1.1 Malice Aforethought

Of those subjective distinctive properties, the first and most important element structuring the category of homicide is that of malice aforethought, which Coke defines as "when one compasseth to kill, wound, or beat another, and doth it sedato animo."[366] This expression works indeed as a compound noun in which the main element is the 'malice' and the qualifying property is that of 'being aforethought.' *Malice* refers to this 'intent to kill, wound, or beat another', that is, the intent 'to cause the death of a man.' What qualifies this intent is the fact of 'being aforethought.' This meaning is also referred to with terms as *forethought*, *prepensed*, and *praecogitata*, and most important of all, as *compasseth*.[367] In other words, all these words here come to express the idea that the 'intent to kill somebody' precedes the actual 'killing of somebody,' and therefore, it is not more or less simultaneous to this action; That is why this 'malice aforethought':

> must be malice continuing untill the mortall wound, of the like be given. Albeit there had been malice between two, and after they are pacified and made friends, and after this upon a new occasion fall out, and the one killeth the other; this is homicide, but not murder, because the former malice continued not.[368]

In other words, this intent to kill was decided beforehand, and the actual killing was thus planned action. Hence, the time at which the intent to kill was formed is going to be an important element in distinguishing the several kinds of homicides Coke considers. This precedence in time of the 'intent to kill' entails that the action or actual killing is caused not by overwhelming emotions or passions which had taken control of one's will as in *sudden*

[366] Ib., 51.

[367] Ib.

[368] Ib.

occasion, when "the heat of the blood kindled by ire was never cooled,"[369], but is done *sedato animo*, that is, in cold blood, in full control of one's emotions. Thus, precedence in time of planned action, by contrast to the sudden occasion, hints at whether there were passions or emotions involved, or whether the criminal was being rational and able to control his emotions.

This continuity of the intent applies also to the solicitation of crime so that when "A command B to kill C, and before the act be done, A repenth and countermand his commndement, and charge B not to do it: if B after killeth him, A is not accessory to it: for the malicious minde of the accessory ought to continue to do ill until the act done."[370]

3.1.1.2 Voluntariness

Next comes an aspect that qualifies whether "the law shall couple the event to the cause"[371] when the proximate cause apparently is human action. A homicide is *voluntary* when the action causing the death is controlled by the defendant's own will.[372] In contrast, a homicide happens by *misadventure* or *misfortune* when the action causing the death is not controlled by the defendant's own will. In other words, *voluntariness* indicates that the cause of the death should be attributed to the defendant's will, whereas its negation, *misadventure*, entails some other external force to which the death should be attributed instead of the defendant's will.

3.1.1.3 Sound Memory and Age of Discretion

Another important subjective element in structuring the category of homicide has to do with the mental capacity of the defendant, and consequently, whether they can be held liable. One question is whether the defendant caused the death of somebody being *compos mentis* or not. In the English translation, the meaning of this Latin expression is 'of sound memory,'[373] meaning 'mentally sound.' Therefore, the antonymous meaning would be that of 'insanity.' It should be recalled that for Coke, this is not a defining feature of persons but

[369] Ib., 55; see also p. 51.

[370] Ib., 51

[371] Ib.

[372] Ib., 54, 55, 56

[373] Ib., 47, 55.

a mental state, which has a temporal dimension.[374] Another element concerning the defendant's mental capacity is whether they are within "the age of discretion,"[375] which is fourteenth years old.[376]

3.1.1.4 Feloniousness

Likewise, a way of distinguishing between types of homicide is to differentiate between those that are considered *felonious*, meaning that they are 'unatonable and subject to punishment,' and those that are not *felonious* and therefore liable to other lesser penalties such as forfeitures, or are candidates for some form of mitigation.[377]

3.1.1.5 Consummation

As mentioned above, *killing* is understood as 'to cause somebody to die.' This instrumental definition entails the employment of some means by which the death of a person is brought about, such as "by poison, weapon sharp or blunt, gun, crossbow, crushing, bruising, smothering, suffocating, strangling, drowning, burning, famishing, throwing down, inciting a dog, or bear, &c. to bite, or hurt." These are actions that involve some form of direct violence or aggression to the body of a person, but there are also other indirect actions such as "laying a sick man in the cold"[378] or "the commandement… expressly to the killing of another"[379] that do not entail immediate violence.

This definition of homicide also implies that such instrumental actions have the effect that "death ensueth" them,[380] and should be connected to it as its cause.[381] That is, the definition of homicide as 'causing someone to die' entails a conduct that constitutes the means and the cause by which the death is effected, which, if there is a homicide, must be consummate and should be the cause of death. Thus, the notion of 'consummation' is not one

[374] Ib., 55.

[375] Ib., 47, 55.

[376] Ib., 57.

[377] Ib., 54, 55, 56.

[378] Ib., 48.

[379] Ib., 51.

[380] Ib., 48.

[381] Ib., 53, 51.

that is directly formulated, but it is entailed by the definition of *killing* as 'causing someone to die.' As we will see, this notion is involved in the structuring of the subcategory of murders.

3.1.2 Structure of the Category of Homicide

Coke points out four main hyponyms of homicide: *petit treason, felo de se, murder* and *manslaughter*.[382] Of these, only the latter two are relevant to our discussion and will therefore be addressed. The two are direct antonyms as they can be distinguished from each other upon whether the 'killing of somebody' is done with malice aforethought or not.

3.1.2.1 Manslaughter

Though Coke occasionally uses it as synonymous with *homicide*, *manslaughter* has a more specific meaning of 'killing of somebody not with malice aforethought," and as such it is an antonym of *murder*. As Coke puts it, "there is no difference between murder, and manslaughter; but that the one is upon malice aforethought, and the other upon sudden occasion: and therefore, is called chancemedley" In this excerpt, it seems as if the hyponym *manslaughter* receives the name of the main component differentiating it from murder*: sudden occasion*, which is also called *chancemedley,* and which is an antonym of *malice aforethought*. However, *manslaughter* also appears as a larger category that is structured attending as to whether the 'manslaughter' is done voluntarily or by *misadventure*. Furthermore, among the voluntary manslaughters, he distinguishes between 'felonious voluntary manslaughers' called *chancemedley*, and 'non-felonious voluntary manslaughters.'[383]

3.1.2.1.1 Chancemedley

According to Coke, "homicide is called chancemedley, or chancemelle, for that it is done by chance (without premeditation) upon a sudden brawle, shuffling, or contention… so as killing of a man by chance-medle, is killing of a man upon a sudden brawle or contention by chance."[384] As said earlier, this means that the intent to kill is almost simultaneous to the

[382] Ib., 55.

[383] Ib.

[384] Ib., 57.

killing, for which there cannot be 'malice aforethought.' The cause or motive of the homicide, as was suggested, cannot be traced back to the will of the manslaughter but to the "heat of the blood kindled ire."[385] As it happens to be, a man possessed by his emotions or passions has somehow diminished rational capacity; he is not fully in control of his faculties the way a man who plans his action is. The distinction is nicely illustrated by this example Coke gives us:

> If two fall out upon a sudden occasion, and agree to fight in such a field, and each of them go and fetch their weapon, and go into the field, and therein fight, the one killeth the other: here is no malice prepensed, for the fetching of the weapon and going into the field, is but a continuance of the sudden falling out, and the blood was never cooled. But if they appoint to fight the next day, that is, malice prepensed.[386]

3.1.2.1.2 The Periphery of Manslaughter

Thus, the prototype of manslaughter is this sudden occasion or the case of a homicide during a fight. There are other cases that resemble the fight in that they are not malicious, but which do not constitute real offences because they are not felonious and therefore are candidates for pardon.

Like chancemedley, this homicide is done without 'malice aforethought.' Coke explains that it happens "when a man doth an act that is not unlawful, which without any evill intent tendeth to a man's death."[387] The act is not unlawful because it happens "by misadventure, *per infortunium,* or casu,"[388] that is, it is not voluntary, or caused by a willed action intended to cause the death of somebody, but rather by accident, as when somebody pruning a tree, leaves a branch dropping upon somebody, or a ball hits the arm of a barber making him to slit his client.[389] These are actions with the unintended consequences of killing somebody. So, this category receives the name of *misadventure,* which is synonymous with *infortunium,* and an antonym of *murder*.

[385] Ib., 55.

[386] Ib., 51.

[387] Ib., 56.

[388] Ib., 55.

[389] Ib., 56.

Another subcategory of manslaughter includes those actions that are "voluntary, and yet being done upon an inevitable cause are no felon."[390] This subcategory, which can be named as 'self-defense' since it was such manslaughter, is also qualified as *se defendendo.* In this subcategory, the *inevitable caus*e or *inevitable necessity* means that there is prior duty to retreat which cannot be fulfilled because there is no way to escape, such as "if A. assault B. so fiercely and violently and in such a place and in such a manner, as if B. should give back, he should be in danger of his life." Given the condition of the prior duty to retreat, this is homicide in self-defense and not a felony because "it is not done in felleo animo," but "upon inevitable cause,"[391] that is, "inevitably in defense of himself."[392]

However, the periphery of 'self-defense' includes cases in which there is no inevitable cause and no attempt to retreat, "as if a thief offer to rob or murder B. either abroad or in his house, and thereupon assault him, and B. defend himselfe without any giving back, and in his defense killeth the thief, this is no felony; for a man shall never give way to a thief, &c. neither shall he forfeit any thing."[393] Likewise, officers who in the course of their office have to defend themselves against assault or find violent resistance, "are not bound by law to give back" and if to kill somebody is not a felony either.[394]

3.1.2.2 Murder

If the prototype of manslaughter is the homicide that happens in a fight, murder is, by contrast, planned homicide. Thus, Coke defines murder as:

> When a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the king's peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c. die of the wound, of hurt, &c. within a year and a day after the same.[395]

---

[390] Ib., 55.

[391] Ib., 56.

[392] Ib., 55.

[393] Ib., 56.

[394] Ib., 56; see also 55.

[395] Ib., 47.

In addition to the mental capacity, in this definition, an action and its effect or consequence are the features of killing. However, the defining trait distinguishing it from *manslaughter* is the 'malice fore-thought.' As we will see, this adds one more level to the causal chain, for this intent must precede the action that causes the death. Thus, if the action is considered to have "sprang out of the root of malice," it seems that the very essence of murder lies in that malice aforethought with regard to which the action and the effect are but mechanical consequences. Coke, however, annexes a clause about implied malice which seems to run against that idea.

3.1.2.2.1 The Periphery of Murder

This fact suggests that the structure of the subcategory of murder is going to be formed by a core corresponding to the foregoing definition, and a periphery of cases which do resemble that core but lack some of its elements.

Murder by Malice Implied

Coke further subdivides this category according to "the manner of the deed," "the person slain," and the "person killing," which are the motives by which the law implies malice. But as a matter of fact, the malice can be only said to be implied, that is, inferred from the circumstance in the first of the divisions which embraces those who "killeth another without any provocation on the part of him," and "the poisoning of any man, whereof he dieth within the year." The other cases are within the boundaries of manslaughter, as when royal officers are killed while performing their duty, or negligence or recklessness as the case of the homicide in the course of a robbery, or "if a prisoner by the dures of the gaoler, commeth to untimely death."[396]

Murder of Misfortune

There are also conducts which, though naturally falling within the category of misfortune, are considered murderous because of their unlawful nature:

> If one shoot any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evill intent in him, this is per infortunium: for it was not unlawful to shoot at the wilde fowle: but if he had shot at a cock or hen, or any tame fowle or

[396] Ib., 52.

> another mans, and the arrow by mischance had killeth a man, this had been murder, for the act was unlawful.[397]

However, this contravenes the principle that in misfortune the intent rather than the effect of the action is the basis for criminal liability. Thus, it seems that in these cases, the anomalous nature of this type of murder was sanctioned with lesser punishments. As Coke puts it, in these cases:

> this is murder; for that he had an ill intent, though that intent extended not to death, and though he knew not the party slaine. For the killing of any by misadventure, or by chance, albeit it be not felony, quia voluntas in delictis, no exitus spectator; yet he shall forfeit therefore all his goods and chattels, to the intent that men should be way so to direct their actions.[398]

Murder by Abetment

As we said earlier, if homicide is the bringing about of the death of somebody by some means, these can sometime be indirect means, such as the abetment of somebody to commit a crime. This situation departs from the core of murder in that, in the example, the person committing the deed that causes the death is the same as the person who has planned it, and has the malice aforethought. However, in the case of solicitation, the perpetrator is the instrument of the author of the crime. In that case, therefore, the "commandment" is considered to be the action that causes the death. However, there is a situation analogous to misfortune when the effect of the commandment might not be the intended one so that "if A command B, to kill C, and B by mistaking killeth D in stead of C, this is murder in B because he did the act…. but A is not accessory, because his commandement was not pursued; and his consent, which must make him accessory, cannot be drawne to it, for he never commanded the death of D."[399]

However, there are cases of this "misfortune" that are considered murder, as "where death ensueth upon that act which is commanded, though death it selfe be not commanded, there he is accessory to it, for there the commandement is the cause of death." The difference here is not whether the death is intended and commanded to be cause, but whether it is the

[397] Ib., 56.

[398] Ib., 57.

[399] Ib., 51.

consequence of the act commanded, or not. That is, the accessory is held liable of all the consequences that follow the action he commands whether he intended them or not.[400]

Murder by False Accusation

Within murder, concerning indirect murders, and somehow related to solicitation, Coke notes that "there is another kind of murder (which is not holden for murder at this day) … ceux auxi que fauxement pur lower, ou en auter manner ount ascun home damne ou fait damner au mort, &c. yet this is murder before God. And David killed Uriah with his pen, and these men with their tongue."[401] In this passage, Coke is probably thinking of the trial jury, and obviously of cases in which there is false judgment. However, within this case of indirect homicide there is a situation that is analogous to that of the misadventure, not because there is an unintended effect, but because there is no consummation or no intended effect. And this is where we reach the doctrine that the deed must be taken for the fact. It is time to go back to Coke's definition of conspiracy. I shall reproduce it again:

> Conspiracy is *a consultation and agreement* between two or more to appeale, or indict an innocent falsely and maliciously of felony, whom accordingly they cause to be indicted or appealed; and afterward the party is lawfully acquitted by the verdict of twelve men: the party grieved may be relieved, and the offender punished in two wayes. First, by a writ of conspiracy, which is a civill or common action at the suit of the party, wherein the plaintife shall recover damages, and the defendant shall be imprisoned. Secondly, by indictment at the suit of the king, the judgement whereof is criminal.[402]

3.1.2.2.2 The Ancient Law of Conspiracy

In order to understand what Coke's view of the offense of conspiracy was, how he placed it as a type of homicide, and what this means, we have to keep in mind what Coke suggests in the paragraph citing Britton above, that the punishment of such behavior has indeed started "before the raigne of H. 1.," when "they which plotted, or compassed the death of a man under pretext of law by bringing false appeales, or preferring untrue indictments against the innocent of felony, who being duly acquitted, both the appellant and

[400] Ib.

[401] Ib., 48; citing from Britton, I, 14.

[402] Ib., 143.

his abbettors were to suffer death."[403] Yet, later on, "king H. I. by authority of parliament did mitigate the severity of this ancient law (lest men should be deterred and afraid to accuse) and did ordaine that if the delinquents were convicted at the suit of the party, they should make satisfaction, and be fined and imprisoned: but if they were convicted by judgement at the suit of the king… then they should lose the freedome of the law."[404] This belief regarding the source of the offense of conspiracy led Coke to conclude that the thirteenth century statutes were "but in affirmance of the common law," and that the punishment at the suit of the king was also at common law.[405] In other words, for Coke, the statutes providing the writ were only declaratory of what had been the ancient law.

This fact would explain why, in his definition of conspiracy, Coke does not resort to the terms of the Statute of Conspirators' but rather uses his own ones, defining it as a "a consultation and agreement between two or more, to appeale, or indict and innocent falsely, and maliciously of felony, whom accordingly they cause to be indicted or appealed; and afterwards the party is lawfully acquitted by the verdict of twelve men."[406] This alternative definition seems to be molded on the abovementioned ancient definition of those who "plotted, or compassed the death of a man under pretext of law by bringing false appeales, or preferring untrue indictments against the innocent of felony, who being duly acquitted, both the appellant and his abettor were to suffer death."[407]

But what does this ancient law have to do with the medieval offense? Were those two the same thing? What was that ancient law more specifically? For one thing, both in Coke's definition and in the ancient one there is a shift of focus from the false indictment to the purpose to which this false indictment was a means to. And this purpose is that of causing somebody to die, since this is the consequence of a successful indictment of felony. Elsewhere he says that conspirators seek to "attaint and overthrow the innocent" or "the death

[403] 2 Inst 383-4.

[404] 3 Inst 384.

[405] 2 Inst 562. See also 3 Inst 143.

[406] 3 Inst 143.

[407] 2 Ins 383.

and shedding of the blood of an innocent."[408] If we trace down the source from which Coke draws the conclusion that there was an ancient law that the medieval statute of conspirators mitigated, this ancient law becomes apparent.

As discussed earlier, the *Mirror of Justices* classified false accusations as homicides in will, committed by those "who appeal or indict an innocent man of a mortal crime and do not prove their appeals or their assertions; and such were formerly adjudged to death, but King Henry I ordained this mitigation, that they should be adjudged, not to death, but corporal punishment."[409] This homicide in will was indeed defined as the offence of having "the will to kill but do not kill" committed also by:

> Those who torture a man so that he confesses to a mortal sin he has not committed, and to alleviate torment, preferring death, falsely confesses a felony. And sometimes such persons are brought to their end by the records of coroners or justices. And in like case are those by whom cripples, children, and others who cannot walk are cast and left in desert places, or in such spots they if they do not die of hunger it is no thanks to those who put them there, albeit God sends them aid… also false jurors, false witnesses… this sin is likewise committed by those who imprison folk in such places, or put them in such pain, that it can be found by inquest that they were nearer death by such eveil places or pains. In three was God killed, for Longinus killed him in fact with the others who hung or torture him. By tongue or by word Pilate killed him, for he ordered the killing, and by will the false witnesses killed him, as did all those consenting thereto."[410]

In other words, all these conducts are characterized by the fact that they are indirect means to commit homicide either by letting the circumstances or having others to work out the desired effect, though this effect never comes true. These situations and conducts are bound by the same principle that "those who have the will to kill… are to be adjuged to death for their corrupt intention, albeit they did not kill according to their purpose."[411]

That is, according to the *Mirror*, these are instances of behaviors that are subject to the doctrine that the will must be taken for the deed, which is consistent with the fact that there is no way to know these indirect homicides except when they fail. This is the ancient

---

[408] 3 Inst 143.

[409] Mirror bk 1, c 16.

[410] Ib., bk 1, c 9; see also bk 1, c 16.

[411] Ib., bk 1, c 16.

law. But the doctrine that the will should be taken for the deed should not throw us off. We should rather focus on why and where Coke pulls off this doctrine. The *Mirror*, as mentioned, does not call it by name but as a "homicides in will." The doctrine comes in handy to explain why this appears in the periphery of murder. And what is it that appears? It is a situation that resembles that of murder, but which does not fall within its definition: there is 'malice aforethought', which is here referred to as "plotting and compassing the death of a man by pretext of law," or "consultation and agreement between two or more to appeale, or indict an innocent falsely and maliciously of felony," there is an action in the form of a false indictment, but there is no death following it because the defendant is acquitted. In other words, this is a homicide in which all the elements of murder are present except for the death of the victim. Thus, it becomes part of the periphery of murder in that it resembles it but is not such because there is no consummation. This anomaly about the category of murder is explained by Coke resorting to the ancient doctrine that the will must be taken for the deed.

It follows that *conspiracy* is interpreted here as 'malice aforethought,' and is as such synonymous with *plotting, compassing, imagining*.[412] This view of the false accusation as a type of murder is clearly consistent with the way Coke frames the definition of conspiracy as a "consultation and agreement between two or more, to appeale, or indict an innocent falsely, and maliciously of felony, whom accordingly they cause to be indicted or appealed; and afterward the party is lawfully acquitted by the verdict of twelve men."[413]

It is true that the term *consultation* connotes a collective endeavor such as a meeting, but the focus here is not so much on the meeting as it is on the content and occasion of the same: to kill somebody by false accusation. Likewise, the term *agreement* connotes the fact that there is some form of abetment in that probably one of the parties is arranging others to bring a false bill of indictment, to bear false testimony, etc., but the important thing here is the purpose of the agreement. Regarding that purpose, it should be said that in this view of the false accusation related to murder, there is a failure. That is, there is an action in pursuance of the malicious intent, which does not have the expected effect. That action indeed is the

[412] For false imagination see 3 Inst 32.

[413] Ib., 143.

false indictment, and the whole point of this interpretation is that it should be punished as a sort of murder because of its intent or purpose.

3.2 High Treason in Coke

3.2.1 Coke's Analysis of The Treason Act 1351

Coke's discussion of the crime of high treason is presented as a commentary of the statute Treason Act 1351 (25 Edw 3 st 5 c 2), declaring the sorts of behaviors that ought to be considered as treason, which he quotes both in Law French and in the English translation. The three types of acts of treason, or treasonous behavior that are relevant to the problem of conspiracy are: compassing the death of the king, levying war against the king, and adhering the king's enemies, respectively quoted and translated by Coke in this way:[414]

Language	**Death of the king**	**Levying of war**
Law French	Quant home fait compasser ou imaginer la mort nostre seignor le roy, madame sa compaigne, ou de lour fitzeigne et heire.	Si home leve guerre enconter nostre seignior le roy en son realme, ou soit aidant as enemies nostre dit seignor le roy en son realme, donnant a eux aid, ou comfort en son roialme, ou per aylours, et de ceo provablement soit attaint de overt fact per gents de lour condition
English	When a man doth compasse or imagine the death of our lord the king, of my lady his queene, or their eldest sonne and heire.	If a man doe levie warre against our lord the king in his realme, or be adherent to the kings enemies in his realme, giving to them aide and comfort in his realme or elsewhere, and thereof be

[414] 3 Inst 1-2.

		provably attainted of open deed by people of their condition.

In these quotes, we already find some of the central lexical elements of the field of high treason, regarding the abovementioned subfields of compassing the death of the king, levying war against the king, and adhering the king's enemies: *compasser/compasse*, *imaginer/imagine*, *leve guerre/levie warre*, *soit aidant/be adherent*, *overt fact/open deed*. The meaning of these terms is going to depend largely on the semantic relations that relate them to other terms as they are integrated in larger fields as Coke interprets the different clauses of this statute.

To begin with, Coke considers treason as a structured category or "*membrum divisum*" which is divided into six different "classes or heads." He describes the concepts concerned here, and corresponding to three of these classes of acts of treason, as "compassing or imagining the death of the King/Queen/Prince and declaring the same by some overt deed," "levying war against the king,"[415] and "adhering to the king's enemies."[416] In giving these definitions, Coke is already interpreting the original statute since the clause regarding the *overt deed* did not appear in the case of compassing the death of the king, but as a procedural clause indicating that the treason of levying war against the king was to be "probably attainted of open deed by people of their condition."[417] Coke justifies this interpretation in that a subsequent statute[418] explicitly made compassing to kill the king a felony, from which Coke implies that in addition to compassing "there must be some other overt act or deed tending thereunto, to make it treason within the statute of 25 E. 3."[419] Otherwise, it would not have been necessary to enact the said statute, making it illegal to merely compass something.

[415] Ib., 3.

[416] Ib., 4.

[417] Ib., 2.

[418] 3 Hen 7 c 14

[419] 3 Inst 38.

3.2.2 Attempt Theory of the Treason of Compassing the King's Death

As to the first of these two treasons, at first sight, three elements can be distinguished: the act of compassing, the object or matter of such act—the death of the king—, and the overt act that Coke has added to this definition. In order to determine the conditions of liability, the questions arise as to how this conduct should be understood and what the relation between *compassing* and the *overt act* is. This requires further interpretation of the meaning of these two terms.

One way to interpret these terms is by mapping them onto the doctrine that the will must be taken for the deed. In Coke's words: "Let us see first what the compassing the death of a subject was before, and at the time of the making of this statute, when voluntas reputabatur pro facto. And Bracton saith, that spectatur voluntas et non exitus, et nihil interest utrum quis occidat, aut causam mortis preaebeat."[420]

3.2.2.1 Will as the Intended Effect of the Action

Coke believed the Treason Act enacting this treason of compassing the death of the king to be declaratory of the common law,[421] and to be grounded on the same principle that regulated the liability for compassing the death of the subject. In the abovementioned passage, the maxim states that in compassing the murder of a subject, the will must be taken for the action, and that the will of the action must determine liability without regard to the effect of the action. What s Coke means by *voluntas* is further clarified if we compare this passage to that from where the quote is excerpted. In there, Bracton discusses homicide by misfortune and accident. The whole passage goes as follows:

> {Accidental homicide}… may be committed in many ways, as where one intending to cast a spear at a wild beast {or does something of the sort, as where playing with a companion he has struck him in thoughtless jest, or when he stood far off when he drew his bow or threw a stone he has struck a man he did not see, or where playing with a ball it has struck the hand of a barber he did not see so that he has cut another's throat, and thus} has killed a man, not however with the intention of killing him; he ought to be absolved, because a crime is not committed unless the intention to injure exists, <It is will and purpose which mark maleficia, nor is a theft committed unless there is an intent to steal.>as may be said of a child or a madman, since the absence of intention protects the one and the unkindness of fate excuses the other. In crimes

[420] Ib., 5.

[421] Ib., 4,5.

the intention is regarded, not the result.It does not matter whether one slays or furnishes the cause of death.[422]

Although this passage occurs in the context of misfortune, Bracton mentions at least four different meanings of *voluntas*, some of which do not have to do with that context: as the target or end towards which an action is thought as a means as compared to the unintended effect of it, as voluntariness as opposed to involuntary body movement, as the intended meaning of a harmful action, and as moral agency or capacity to tell right from wrong.

In quoting Bracton, Coke is drawing an analogy between accident and failure, between the end of an action as opposed to its unintended harmful effect, and the expected or desired harmful effect of an action as opposed to its failure. Thus, Coke focuses on the distinction between the effect of the action, which might be the death of somebody, and the purpose of that action. In the cases where the action has the effect of killing someone, the 'purpose' of such action is the decisive element in determining the lack of criminal liability. Upon this argument, Coke draws the conclusion that if the 'purpose' is the gist of the liability where the effect was unintended, then it is too when the action did not have the intended criminal effect. In that case, the principle of liability that the will must be taken for the action means that the expected effect of the action must be taken for the real unexpected effect of the action.

3.2.2.2 The Action as Failed Execution

In the case of accident or misfortune, there is a harmful action, a homicide. However, in the case of compassing the death of somebody, the action need not be harmful, but "must causam mortis praebere, that is, declare the same [purpose] by some open deed tending to the execution of his intent, or which might be the cause of death." An action 'tending to the execution of its intent,' is an action intended as a means to bring about the death of the victim;

[422] "DE homicidio vero casuali quod multipliciter fieri potest, et de quo supra tactum est, ut si quis telum in feram mittere volens, vel quid tale egerit, vel si cum socius luderet cum socio et iocosa levitate percusserit, vel cum longius staret cum arcu traheret vel lapidem proiceret, et hominem quem non vidit percusserit, vel si cum pila luderet quis manus tonsoris quem non vidit pila percusserit, ita quod gulam alicuius præciderit et sic hominem interfecerit, non tamen occidendi animo absolvi debet, quia crimen non contrahitur nisi voluntas nocendi intercedat. <Et voluntas et propositum distinguunt maleficia, et furtum non committitur sine affectu furandi.> Et secundum quod dici poterit de infante et furioso, cum alterum innocentia consilii tueatur et alterum facti infelicitas excuset. In maleficiis autem spectatur voluntas et non exitus, et nihil interest occidat quis an causam mortis præbeat;" Bracton II, 384.

an intermediate act. One may wonder how far this intermediate act might be from consummation. Coke is not thinking of just any intermediate act but of those "which might be the cause of death". This requirement restricts the scope of the principle to harmful actions. Indeed, Coke provides cases of assault to illustrate this type of action tending to the execution of the intent (assault can be reframed as failure to murder just by the murderous intent): as when a "man's wife went away with her avowterer, and they compassed the death of the husband, as he was riding towards the sessions of oier and terminer and gaole-delivery, they assaulted him and stroke him with weapons, that he fell downe as dead, whereupon they fled". Likewise, when "a youth… would have stolen the goods of his master, and came to his masters bed, where he lay asleepe, and with a knife attempted with all his force to have cut his throat; and thinking that he had indeed cut it, he fled."[423] A third case was when "a man had imagined to murder, or rob another, and to that intent had become infidiator viarum, and assaulted him, though he killed him not, nor took anything from him."[424]

3.2.2.3 Coke's Concept of 'Attempt'

From a contemporary point of view, it can be said that Coke is trying to formulate a concept of 'attempt' understood as 'a failure to commit a crime' This implies an action which puts into execution a frustrated purpose to commit the crime. His view combines the subjective approach with this form of liability: inasmuch as the attempt is conceived as the means to realize some criminal purpose, it does not matter how close the action is to consummation. Yet, at the same time, for Coke, not all acts in execution of a criminal purpose are attempts of murder but only such acts as might have caused the death of the victim. Such are criminal not only in connection with the purpose, but are capable of an objective definition by the law as it is clear that the offender has crossed a threshold of no return. Thus, within this view, the doctrine that the will must be taken for the deed concerning the liability of such attempt means that the failed action must be punished as if it had been consummated. That is, as if the expected result (the will) had taken place (the deed).

[423] Ibidem.

[424] 3 Inst 5.

3.2.2.4 Lexical Structure of the Blending between the Attempt and the Compassing the Death of the King

It should be recalled at this point that Coke believed the statute Treason Act to be a statement of the common law, and therefore of the law of attempt as it applied to regicide. The same principles which applied to the case of compassing the death of the subject applied to the case of compassing the death of the king. Thus, he was blending the notion of attempt expressed with the apothegm that the will must be taken for the deed with the definition of treason. One of the consequences of this conceptual blend is that the lexicon of the said treason of compassing the death of the king would be applied to the description of the said notion of attempt. This means that if we understand the concept of 'attempt' as 'failed action in execution of a criminal purpose,' the opposition *voluntas\factum\exitus* is mapped onto the opposition *compassing\overt act*, which now will designate the component concepts of the notion of attempt 'criminal purpose' and 'failed action'. The new relationship that was established between the two terms was that the *overt act* was the execution of the *compassing*, which therefore was the cause of the *overt act*. These are consequently the causative and executive senses respectively of these terms.

Together, in their new dresses, *compassing* and *overt act* encode the notion of attempt. In this way, these terms are incorporated into the domain of criminal liability: *Compassing* and *overt act* designating the conditions for the imputation or attribution of the legal consequences following the unconsummated crimes. However, these terms did not originally belong to the frame of attempt, but rather to the frame of high treason where, as we will see shortly, they designated different things and had a different relation. The blending of these two frames caused some troubles, as Coke's interpretation did not match either the relationship existing between *overt act* and *compassing* or the structure that the *overt act* had within high treason.

3.2.3 Volitive Theory of the Treason of Compassing the Death of the King

3.2.3.1 Open War

As said earlier, the statute Treason Act did not mention the *overt act* in relation to the treason of "compassing or imagining the death of the King, Queene, Prince." The expression *overt act* derived from another clause of the statute, that providing that "if a man… be

adherent to the king's enemies in his realme, giving them aide and comfort in the realme or elsewhere, and thereof be probably attainted of open deed by people of their condition."[425] This implied joining the monarch's enemies by some form of private bond or confederacy with the enemy, as when "a subject conspire (sic) with a foraine prince to invade the realm by open hostility."[426] The adjective *open* indicates a sense of 'public' by contrast to the private agreement which is illustrated by the expressions "in open war against the king,"[427] *open hostility*,[428] and *open rebellion*.[429] The *open deed* therefore has an evidential value: it is merely a procedural requirement since given its nature such private agreement and joining cannot be known and tried until it has not been manifested and made public by an act of open hostility. It is that act, in the end, that makes the treason.

3.2.3.2 Compassing as a Crime

Therefore, in Coke's definition of the treason of death of the king by "compassing or imagining the death of the King, Queene, Prince, and declaring the same by some overt act."[430] *compassing* appears as the criminal activity itself, and the *overt act* as an evidence of it. That is why, from the evidential point of view, *compassing/imagining* is described as a "secret in the heart."[431] And as such, it "is to be discovered by circumstances precedent, concomitant, and subsequent"[432] Therefore, there should be "direct and manifest proof, not upon conjectural presumptions, or inferences, or straines of wit; but upon good and sufficient proof."[433] This is the *overt act* which can be described as evidence of a secret conceiving of the death of the king.

This evidential definition of the *overt act* is quite different from that of its attempt sense. If the crime is consummated with having the purpose merely, and the *overt act* is just

[425] Ib., 2.

[426] Ib., 14.

[427] Ib., 10, 11, 12.

[428] Ib., 11, 14.

[429] Ib., 11, 12.

[430] Ib., 3.

[431] Ib., 14.

[432] Ib., 6.

[433] Ib., 12.

something revealing it, this does not agree with the restrictions imposed upon the *overt act* that it must be an act in execution of this will, and that it must be such as might cause the death. In this attempt interpretation, intent is the central aspect in determining the criminal liability of the *overt act*, but not the crime itself. Indeed, the *overt act* is an action that comes before the commission of the crime itself since it puts it into execution. In the evidential reading of the crime, the *overt act* is a central element in proving the liability for a crime which has already been committed. It is one thing to consider the conceiving of the death of the king as a crime to be proved by its execution, and quite another to consider that the failed execution of such a plan is an attempt to commit regicide. Evidence is always by nature *ex post facto*, whereas the attempt is *ex ante*.

3.2.3.3 Structure of the 'Overt Act'

It is perhaps due to the interpretation of the statute as including procedural requirement of "direct and manifest proof," that the question of admissible evidence concerning this treason of planning the death of the king received the attention of the courts, leading to the development of a sort of special law of evidence. Indeed, it can be said that a great part of the law of this act of treason of compassing the death of the king is rather law of evidence, and that there is very little case-law development of the substance of the criminal behavior of plotting. In this law, we can see that the relationship between proof and the thing proved is not always a natural one as might indicate the words that it is "to be discovered by circumstances precedent, concomitant, and subsequent."[434] Rather, it seems that the relationship is forensic and exists only in the law. In that sense, if we approach the relationship between evidence and the thing it proves as a semiotic one between a symbol and its meaning, the rules of evidence can be understood as rules of interpretation, that is, rules establishing a relation between the meaning of secret purpose and the significant *overt act*. Thus, the relation between overt act and compassing was conventional. In that sense, in developing the category of overt act, the courts were also creating synonyms of compassing. Words, acts dethroning or coercing the king, preparing the execution of the plan, and adhering the king's enemies were considered evidence of such overt act.

[434] Ib., 5.

3.2.3.3.1 WORDS

The problems caused by the fact that Coke uses a vocabulary belonging to a different domain to describe the idea of attempt is further illustrated by the construction of the different actions that are considered as evidence of the compassing of the death of the king, much of which fall short from failures in the execution of such purpose, and some of which can hardly be considered within the definition of evidence of a secret planning of the king. Indeed, a plan might be revealed or discovered by acts that are not in direct execution of it, as is the case of words. Thus, in his discussion of the concept of 'attempt' Coke argued that:

> It was not a bare compassing or plotting the death of a man, either by word, or writing, but such an overt deed... to manifest the same. So as if a man had compassed the death of another, and had uttered the same by words or writing, yet he should not have died for it, for there wanted an overt deed tending to the execution of his compassing. But if a man had imagined to murder, or rob another, and to that intent had become infidiator viarum, and assaulted him, though he killed him not, not took anything from him, yet was it felony, for there was an overt deed.[435]

Yet, he goes on to concede that by the ancient law*:* "in the case of the king, if a man had compassed, or imagined the death of the king… and had declared his compassing, or imagination by words or writing, this had been high treason, and a sufficient overture."[436] And that although "divers latter acts of parliament have ordained, that compassing by bare words or sayings should be high treason… all they are either repealed or expired." Yet the reason for such restriction is a matter of procedural certainty:

> And it is commonly said, that bare words may make an heretic, but not a traytor without an overt act. And the wisdom of the makers of this law would not make words only to be treason, seeing such variety amongst the witnesses are about the same, as few of them agree together.[437]

It is also a matter of policy as:

> Not only the ignorant and rude unlearned people, but also learned and expert people minding honesty, are oftentimes trapped and snared, yea, many times for words only, without other fact or deed done or perpetrated: therefore…

[435] Ib.

[436] Ib.

[437] Ib., 14.

> there must be and overt deed. But words without an overt deed are to be punished in another degree, as an [sic] high misprision[438]

This distinction between overt act and words is simply a matter of the quality of the evidence. Mere words are considered unreliable evidence not only in that there are different versions, but also in that frequently they might express or declare a plan only in the surface but in reality, a mere wish or a way of saying. But for the same reason, written words are considered sufficient evidence of planning as "set downe in writing by the delinquent himselfe, this is a sufficient overt act within the statute."[439]

3.2.3.3.2 Dethroning, Coercing and Preparations

There are several acts which are considered evidence of compassing the death of the king. This is the case of acts leading to, or with the purpose of, dethroning the monarch as "he that declareth by overt act to depose the king, is a sufficient overt act… and so is to imprison the king into his power, and manifest the same by some overt act.[440] It also includes acts threatening or coercing the monarch's will as taking "the king by force, and strong hand, and to imprison him until he hath yeelde to certaine demands", or to intend "to goe to the court where the queen was, and to have her into their power, and to have removed divers of her counsel, and for that end did assemble a multitude of people." Likewise, it covers acts of preparation but short of the execution of the plan "as if divers doe conspire the death of the king, and the manner how, and thereupon provide weapons, powder, poison, assay harness, send letters, &c. or the like, for execution of the conspiracy."[441]

3.2.3.3.3 Other Treasons as Evidence

Sometimes acts which fall short of the other two treasons analyzed here are considered as evidence of the compassing of the death as when "a subject conspires with a foraine prince beyond the seas to invade the realme by open hostility, and prepare for the same by some overt act." Yet the general rule, saving statutory exceptions, it that one kind

[438] Ib.

[439] Ib.

[440] Ib., 6.

[441] Ib., 12.

of treason "cannot be an overt act for another. As for example: a conspiracy is had to levy warre, this (as hath been resolved) is no treason by this act until it be levied."[442]

3.2.3.4 Lexical Structure of the Volitive View

We are now ready to see how the vocabulary involved in the description of this treason of 'conceiving the king's death' is consequently structured. The purpose is referred to by the terms *compassing, imagining, plotting, intent, machinating, counselling, invent, devise* and *conspiracy*. The evidence of such purpose is designated with the terms *act* and *deed*. In that sense, the purpose is contained within the definition of this *act*. From the epistemological and procedural point of view, there is a relationship of opposition between them, here signified by the terms *secret* and *overt/open*, designating their knowability or unknowability respectively. Within the type of acts that constitute evidence there is still a further distinction between *word* and *act*, with the distinction within the words sometimes between *bare* and spoken words, and written or publicly uttered words.

3.2.3.4.1 Conspiracy

The term *conspiracy* already appeared in Coke's discussion of the Treason Act as a synonym for *compassing*, meaning to have conceived the death of the king. The use of this term within this context is rare, nevertheless, and was probably influenced by the Elizabethan statutes. Furthermore, the paradigmatic relations it establishes with other words seem to suggest that the meaning is rather that of a collective purpose in the form of a 'plan' as in the sentence "if *divers do* conspire the death of the king, and the manner how, and thereupon provide weapons, powder, poison, assay harness, send letters, &c., or the like, for execution of the conspiracy."[443] This is also the case of the sentence "if *many* conspire to levie war, and some of them do levie the same according to the conspiracy, this is a high treason in all, for in treason all be principals and war is levied." In other words, whereas words like *compassing* or *imagining* do not restrain the possibility of a single individual *compassing*, the term *conspiracy* clearly does."[444] Indeed, another syntagmatic element associated to the term *conspiracy*, the purpose of "levy war," suggests that in addition to the meaning of

[442] Ib., 14.

[443] Ib., 12.

[444] Ib., 9.

'planning', it might also be used to mean an 'alliance or confederacy against an enemy'. That is why it forms expressions like "a conspiracy *is had* to levie warre" or "If a subject conspires *with a foraine prince* beyond the seas to invade the realme by open hostility."[445]

The concept of alliance against an enemy, and the concept of conceiving or thinking of, as being designated both by the same term is further illustrated by Coke's commentary on the statute of 3 Hen 7 c 14. This statute was enacted to complete the statute Treason, within the scope of which, "if actual deeds be not had," did not fall "false compassings, imaginations and confederacies had against any lord, or any of the kings counsel, or any of the kings great officers in his household, as steward, treasurer, and comptroller."[446] For the prevention of such deeds it was made a felony for "any servant sworne, and his name put into the chequer roll of his household, whatsoever he be, serving in any manner, office, or roome, reputed, had and taken, under the state of a lord, make any confederacies, compassing, conspiracies, or imaginations with any person or persons, to destroy or murder the king, or any lords of his realme, or any other person sworne to the kings counsell, steward, treasurer, or comptroller of the kings house."[447]

The offence the statute is referring to is a form of cooptation of the king's disillusioned servants so that they were abetted to murder members of the king's council or any of the high officers. Thus, the central concept involved here is that of an alliance or confederacy against an enemy. This concept is not only signaled by the terms *confederacy* and *conspiracy*, but also by the syntagmatic relations illustrated in the sentences "*false* compassings, imaginations, and confederacies *had against any lord*," and "if any servant… *make* any confederacies, compassings, conspiracies or imaginations *with any person or persons.*"[448] The first formulation reminds us of the false oath had against somebody, which was so characteristic of the alliance by conspiracy in the Middle Ages as discussed in the second chapter. The second indicates that alliances need to be made or created, as with any bond, and that it should be with the concurrence and consent of several people. Within these

[445] Ib. 14.

[446] 3 Hen 7 c 14.

[447] 3 Inst 37; 3 Hen 7 c 14.

[448] 3 Inst 37.

constraints, the words *compassing* and *imaginations* appear here in paradigmatic relation to *confederacy* and *conspiracy*, and clearly the meaning to have a purpose is secondary to the idea of entering into an alliance. Alliances are made by certain people, against certain people, and with certain purpose.

Coke, nevertheless, interprets this statute from the point of view of his attempt theory of the overt act. According to that theory, the purpose of an action stood for the action when its effect was either unintended or frustrated. That meant that mere compassing revealed by some overt act was not the treasonous behavior, but rather a failed or aborted regicide. This statute demonstrated that "besides the confederacy, compassing, conspiracy, or imagination, there must be some other overt act or deed tending thereunto, to make it treason within the statute 25 E. 3. And therefore, the bare confederacy, compassing, conspiracy, or imaginations by words only, is made felony by this act. But if the conspirators doe provide any weapon, or other thing, to accomplish their devilish intent; this and the like is an overt act to make it treason."[449]

In this view, the terminology of high treason was applied to refer to this concept, so that the *compassing* designated the criminal purpose, and the *overt act* the failed action. Likewise, the term *compassing* designated all the terms in paradigmatic relation with it such as *confederacy*, *compassing*, and *imagination*. Thus, *conspiracy* and *confederacy* appear ripped off of their social aspect, as a form of volition or cognition, as opposed to their execution into an action. This is even clearer when, in talking about how the king's servants being closer to his counsellors and high officials made it easier to try to kill them, Coke comments that "such *attempt* and *conspiracy* was before this parliament made by some of this kings household servants." Finally, the purpose to which the volitive *conspiracy* is referring to can be merely expressed by words or acted upon. To such unacted but expressed purpose Coke refers with the term *bare* added to *conspiracy*.[450]

[449] Ib., 38.

[450] Ib.

3.2.4 Levying War

3.2.4.1 Meaning and Source

The other act of treason that touches the issue of *conspiracy* is when "a man doe [sic] levie warre against our lord the king in his realme." According to Coke, this was "high treason by the common law, for no subject can levie warre within the realme without authority from the king,"[451] and the statute *Treason Act* simply declares or states it. The meaning of *levie warre* involves an "actual rebellion or insurrection," though the minimum requirement is that several people meet together "bearing of armes in warlike manner."[452] However, the meaning of *levy war* was liable to interpretation, in part due to subsequent legislation, in part due to its interpretation by lawyers.

3.2.4.1 Cognitive Theory of Levying of War

The first change in meaning we can speak about is that of the creation of the cognitive levying of war in Elizabethan times. Following the scheme of the volitive view of *compassing the death of the king*, the statute 13 Eliz 1 c1 (1571) made it an act of treason to:

> Compasse imagyn invent devyse or intend... to levye Warre against her Majesty within this Realme or without… and suche Compasses Ymaginacions Invencions Devises or Intentions or any of them, shall malitiously advisedly and expressly utter or declare by any Pryntinge Wrytinge Cyphryng Speache Wordes or Sayinges.

Thus, though the term *overt act* is not directly used, the structure clearly reveals the opposition *compassing/over act*, where the evidence of the purpose to levy war is merely verbal. Furthermore, though the statute does not use the term *conspiracy* to describe the idea of having such purpose, Coke does so in saying that "during the life of the queen, a *conspiracy* to levie war was high treason, though no war were levied; and upon that law, Bradshaw, Burton, and others, were attainted of high treason, for *conspiracy* only to levie war." However, Coke denies that the volitive levying of war was a treason by the Treason Act: "a compassing or conspiracy to levie ware, is not treason for there must be a levying of war in facto." In this very passage, he nevertheless combines the volitive reading of levying of war with those other executive readings and social meanings of it. Thus, "if many conspire

[451] Ib., 2.

[452] Ib., 10.

to levie war, and some of them do levie the same according to the conspiracy, this is high treason in all, for in treason all be principals, and war is levied."[453]

3.2.4.2 Constructive Treason

The other change in the meaning of levy of war came with the construction of the crime in legal proceedings. As said earlier, a *levy of war* involves an insurrection or rebellion, and the use of force. These are objective elements. But acts short of insurrection or rebellion became treasons under this heading on the grounds that they involved the usurpation of the king's authority as when "any levy war to expulse strangers, to deliver men out of prisons, to remove counsellors, or against any statute, or to any other end, pretending reformation of their own heads, without warrant."[454] Likewise, certain civil disorders such as:

> if three, or foure, or more, doe rise to… alter religion established within the realme, or laws, or to go from town to town generally, and to cast downe inclosures, this is a levying of war (thought there be no great number of the conspirators) within the purvien [sic] of the statute… and so it was resolved in the case of Richard Bradshaw, miller, Robert Burton, mason, and others of Oxforshire, whose case was, that they *conspired* and agreed to assemble themselves with so many as they could procure… to rise and from thence to go from genltemans house, and to cast downe inclosures, as well for inlargement of high-wayes as of errable lands… and it was resolved, that this was a compassing and intention to levie war against the queen.[455]

This was similarly the case of "an insurrection against the statute of labourers for the inhansing of salaries and wages." These acts of civil disturbance fell within the common law offences of riot and unlawful assembly, and the only difference between them and an act of treason under the construction of levy of war was subjective: when the "pretence was publick and general, and not private in particular."[456] Thus, in this constructive treason, the central element was not the objective one, but the subjective purpose of the act of civil disturbance. It should be noted that the terms *conspirators* and *conspired* appear again within this context, where the central idea or concept is now that of an unlawful assembly or meeting of people, and when it becomes an act of treason. The *conspiracy* refers either to the unlawful assembly,

[453] Ib., 9.

[454] Ib.

[455] Ib., 9, 10.

[456] Ib., 10.

or to the organizing of the unlawful assembly. This is the collective sense of *conspiracy*, as a large gathering of people acting with a common purpose.

Finally, a third construction of the meaning of treason is related to the treason of compassing the death of the king: the compassing or imagining to levy war as an act in evidence of the treason of levying of war. With regard to this, as said earlier, Coke opined that one treason "cannot be an overt act for another… a conspiracy is had to levie warre, this (as hath been said and so resolved) is no treason by this act until it be levied, therefore it is no overt act or manifest proofe of the compassing of the death of the king within this act."[457]

3.3 High Treason in Hale

3.3.1 Compassing the Death of the King

3.3.1.1 Source

As Coke, Hale believed that the offense of treason originated at common law, and that the Treason Act had declared it. However, he does explain why this statute was enacted in that before "almost every offense that was, or seemed to be a breach of the faith and alligeance due to the kin, was by construction and consequence and interpretation raised into the offense of high treason."[458] Since the statute had been passed to end with that arbitrariness and uncertainty, Hale laid down the principles of how it should be interpreted in that it is:

> Dangerous to depart from the letter of the statute, and to multiply and inhance crimes into treason by ambiguous and general words… [and] by construction and analogy to make treasons, where the letter of the law has not done it: for such a method admits of no limits or bounds, but runs as far as the wit and invention of accusers, and the odiousness and detestation of persons accused will carry men.[459]

3.3.1.2 Meaning

3.3.1.2.1 Volitive Theory

Matthew Hale's volitive understanding of the treason of compassing the death of the king is in keeping with this narrow view of the meaning of the statute. He described the compassing as the "purpose of the mind or will, tho the purpose or design take no effect,"

[457] Ib., 14.

[458] 1 Hale PC 76.

[459] Ib., 86-7.

that is as "an internal act"[460] or "act of the mind."[461] Likewise, this view leads to the evidential view of the *overt* act. Thus, from the epistemological point of view it was unknowable and unaccountable because "without something to manifest it could not possibly fall under any judicial cognizance, but of God alone," and therefore, the "statute requires an overt-act, as may render the compassing or imagining capable of a trial and sentence by human judicatories."[462] However, this requirement is not merely a procedural matter of evidence but is rather a constitutive element of the offense as it shows that in the indictment the compassing could not be pleaded generally without averting "the particular *overt-act* certainly and sufficiently."[463] That this requirement was the law though was not explicitly stated by the Treason Act, but was demonstrated by the enactment of 3 Hen 7 c 14, which "makes conspiring the king's death to be felony; which it would not have done, if the bare conspiring without an overt act had been treason."[464] Likewise, the statute 21 Ric 2 c 3, 4 "makes the bare purposing, or compassing, treason, without any overt-act… yet it was too dangerous a law to put mens bare intentions upon the judgment even of parliament under so great a penalty, without some overt act to evidence it: this was the reason of the repeal of the treasons declared by the statute."[465]

3.3.1.2.2 Attempt Theory

Yet, at the same time, there is evidence that Hale was aware of the attempt view of the offence of compassing the death of the king, so in discussing the liability of foreign ambassadors he pointed out that:

> In the case of bare conspiracy against the life of the king, or a conspiracy of a rebellion or change of government, novarum rerum molimina, there is a great diversity of opinions among learned men, how far the priviledge of an ambassador exempts him from penal prosecution as an enemy for such conspiracies or inconsummate attempts, that do not proceed farther than the machination, solicitation or conspiracy… they assign this reason of the difference between a bare conspiracy or machination against the prince, and an actual attempt of treason, whether against his person or

[460] Ib., 107.

[461] Ib., 108.

[462] Ib., 107.

[463] Ib., 108.

[464] Ib., 112. See also p. 140.

[465] Ib., 111.

> government, which hath attained as great consummtaion (sic), as such embassador is able to effect, as procuring the wounding of the prince, or an actual attempt to poison him, tho death ensue not… because in these latter the mischief is consummate, as far as the embassador could effect it, and so prohibited not only by the civil and municipal laws, but by the laws of nations; but inconsummate machinations, according to these opinions, are raised to the crimen laesae majestatis by civil or municipal laws or constitutions; and they think it too hard, that an embassador or forein agent… should be obnoxious to a capital punishment for bare machination or conspiracy, which is a secret thing and of great latitude; but this, as I have said, is rather a prudential and politic consideration, and not according to the strict measure of justice."[466]

In this passage, the central distinction is not between secret purpose and evidence, but between consummate and unconsummated attempt, that is, between purpose and failed action. In that view, as has been said, the compassing cannot be but an element of the attempt, that is, of the purpose of the attempt that makes it to stand for the crime. From this standpoint, the mere compassing cannot be punished. However, Hale is only concerned here with the rationale of the treason of compassing the death of the king, and he reveals that it is not out of reason, natural law nor justice that such purpose is punishable but as matter of political expediency. This is as much as an admission that volitive treason is an anomaly against reason and justice, maybe subject to the reason of state, but against any sound view of what the law should be. In other words, these laws of treason do not purport to do justice, to redress any evil, but rather to prevent that this evil happens. It is a matter of "prudencial and politic consideration". That is why only municipal law makes it a "crime laesae majestatis, tho the effect be not attainted."[467] That is why the overt act requirement is so important in restoring such expedient law to some measure of certainty and justice, in the procedural sense of a fair trial. It is an exceptional law, but it should not be applied exceptionally.

However, this distinction between purpose and execution, rather than between purpose and evidence, is more characteristic of the treason of levying war against the king. With regard to the issue as to whether an assembly of people to the intent of resisting the government's policy was constructive treason under the Treason Act, Hale remembers that it cannot be considered a "bare assembly to that intent to be a sufficient overt-act of levying

[466] Ib., 97-99.

[467] Ib., 107.

of war; that was but an attempt and putting in ure, unless they had actually begun the execution of that intention, going about, practicing or putting in ure; for this act puts a difference between the same and the doing thereof."[468] That is, he considers that in this case of the treason of levying war against the king, the law punishes the attempt rather than the purpose.

It should be added, though, that in commenting indictments where multiple overt-acts had been laid down, Hale says that "if any overt-act be sufficiently laid in the indictment, and proved, any other overt-acts may be given in evidence to *aggravate* the crime and render it *more probable*."[469] The idea that the other facts aggravate and make the treason of compassing more probable implies that these other facts not only confirm with a greater certainty the purpose to kill the king, but also point out to the seriousness of the purpose. That is, they indicate that the defendant was closer to its execution. This does not deny the volitive theory of treason, but it places it within a different frame: that of the sequence or process that goes from purpose to execution and effect. Thus, the offense is consummated with the purpose, but the fact that the purpose was closer to execution aggravates it. This implies that there is a difference between conceiving the death of the king and attempting it.

3.3.1.3 Overt Act Requirement (Burden of Proof)

As to the requirement that there should be an averment of an act in evidence of the purpose, which is not in the letter of the Treason Act, like Coke, Hale believed that at common law the treason of compassing the death of the king was vague and ambiguous, and that the Treason Act was enacted to put an end to that situation. Likewise, he argued that although "the words in the statute 25 E. 3. *and be provably thereof attaint by open deed* (emphasis is not mine), &c. come after the clause of levying of war, yet it refers to all the treasons before-mentioned, viz. compassing the death of the king, queen, or prince."[470] And that extension of the overt-act clause was proven in that "the statute of 3 H. 7. Cap. 14. makes conspiring the king's death to be felony; which it would not have done, if the bare conspiring

[468] Ib., 125.

[469] Ib., 121-2.

[470] Ib., 108.

without an overt-act had been treason."[471] As to the values that it pursued, Hale thought of the overt-act requirement more as a procedural guarantee. The main protection a defendant had against an arbitrary conviction was the certainty of the indictment, which meant they could traverse it. An indictment framed on the compassing only, can always present the facts so that they are interpreted as having the purpose of the death of the king. Thus, when the facts are true, and cannot be traversed by the defendant, the burden of proof would lie on the latter. And how can the defendant proof that he had no intent? With the overt-act clause, things change. Now the purpose is presupposed, and the prosecution would have to demonstrate that it was revealed by overt acts. This leads to a legal discussion and development as to whether the acts are overt acts or not. This is a matter of law, of the law of evidence. That is, this way the burden of proof lay not on the defendant who would have to prove that he did not have the presumed purpose, but on the prosecution, which would have to prove "the particular overt-act certainly and sufficiently"[472] and eventually argued that acts given in the indictment act are overt-acts.[473] Thus, in commenting the statute 21 Ric 2 c 3 and c 4, he mentions that it "makes the bare purposing, or compassing, treason, without any overt act; and tho it restrain the judgment thereof to the parliament, yet it was too dangerous a law to put mens bare intentions upon the judgment even of parliament under so great a penalty, without some overt-act to evidence it."[474] (It should be noted that though this statute precedes 3 Hen 7 c 14, Hale does not use it as an argument to prove the overt-act requirement).

3.3.1.4 Theory of the Overt Act (Standard of Proof)

According to Hale, an *overt-act* is such fact as "may render the compassing or imagining capable of a trial and sentence by human judicatures."[475] In other words, it is a fact that proves or evidences the unknowable internal act or act of the mind. It is important to underline that this is not a fact in evidence of a criminal act, but of a criminal purpose turned into the offense itself. Proving a mental event is a far more hazardous task than proving that

[471] Ib., 111-12. See also pp. 121-2.

[472] Ib., 108.

[473] See also ib., 121-2.

[474] Ib., 111.

[475] Ib., 107.

a physical action is connected with the commission of a crime, and it always implies some form of inference from "circumstances precedent, concomitant, and subsequent with all endeavor evermore for the safety of the king."[476] This implies, according to Coke, that the prisoner should be *probably attainted* "upon direct and manifest proof, not upon conjecturall presumptions, or inference, or straines of wit." that is, "good and sufficient proof" standard of proof.[477] Hale seems to share the same view as to the standard[478]with Coke, and as him, he explained this standard as an account of facts that are considered "direct and plain" proof of the conceiving of the king's death by contrast to those that are conjectural and uncertain.

3.3.1.4.1 Preparations

Like Coke, Hale develops the concept of 'overt-act' by listing the particular facts that might and might not be considered "good and sufficient proof" of the compassing. The more direct one is the case of preparations, as when "men conspire the death of the king and the manner, and thereupon provide weapons, powder, harness, poison, or send letters for the execution thereof." However, Hale includes within this view the case in which the "conspiracy be not immediately and directly and expressly the death of the king, but the conspiracy is of something, that in all probability must induce it, and the overt-act is of such a thing, as must induce it."[479] Thus, "conspiring to depose the king, and manifesting the same by some overt-act,"[480] that is, the conceiving of the deposition of the king, when known by certain fact, is interpreted as evidence of the compassing of the death of the king. This is also the case when "men conspire to imprison the king by force and a strong hand, 'till he hath gather company or write letters."[481] It should be noted that in this case, the evidence is not plain and direct but involves interpretation and inference of the purpose to depose the king or to imprison him as a means leading to his death.

---

[476] 3 Inst 46.

[477] Ib., 12.

[478] 1 Hale PC 108.

[479] Ib., 109.

[480] Ib., 110-11.

[481] Ib., 109-110.

3.3.1.4.2 Words

According to Hale, spoken words "of themselves cannot make high treason" nor "of themselves are… a sufficient overt-act within the statute of 25 E. 3,"[482] since "they are easily subject to be mistaken, or misapplied, or misrepeated, or misunderstood by the hearers."[483] Yet there are several exceptions: "that words may expound and overt-act to make good an indictment of treason of compassing the king's death, which overt act possibly of itself may be indifferent and unapplicable to such an intent,"[484] That is, this again is an interpretive view of the evidence, such that certain facts are interpreted along with certain words so that they together allow to infer the compassing of the king's death. This is likewise true of "some words, that are expressly menacing the death or destruction of the king."[485] Also, there are statutes that made public speeches a treason.[486] Words put into paper "by the delinquent himself… [or] by any other by his command,"[487] however, are considered good evidence[488] under the Treason Act "if the matters contained in them import such a compassing."[489]

3.3.1.4.3 Assemblies and Alliances

The easiest case of assemblies or meetings of people as evidence of compassing the king's death was that of a group of men "assembling together to consider how they may kill the king." Yet the issue as to whether "a conspiracy to levy war" was "an overt-act, to serve an indictment for the compassing of the king's death"[490] was arguable. For one thing, Hale points out Coke's contradictory views: on the one hand, Coke holds that "the clauses concerning compassing of the king's death, and that of levying war, are distinct clauses, and declare distinct treasons; and therefore the latter shall not be an overt-act to serve the former,

[482] Ib., 114-15.

[483] Ib., 111,12.

[484] Ib., 115.

[485] Ib., 116.

[486] 1 Edw 6 c 12; 1&2 P & M c 10; 13 Eliz 1 c 1; 1 Hale 112,113.

[487] 1 Hale 118-9.

[488] Ib., 111-3.

[489] 1 Hale PC 118-9.

[490] Ib., 119.

because these were to confound several classes or membra dividentia of high treason."[491] On the other hand however, he holds that the case of the Earls of Essex and Southampton to "assemble a multitude of people" to the purpose "to go to the court where the queen was, and to have taken her into their power, and to have removed divers of her council"[492] was considered to be an overt act.

To support that such a conspiracy to levy war was an overt act, Hale refers to the case of the duke of Norfolk, in which a "conspiring with a forein prince to invade this kingdom, and signifying it to him by letters" was considered to be an overt act.[493] Against Coke's former view, and in support of the latter, Hale cites a case from 1663 in which it was decided that "sur indictment pur compassing mort le roy overt fait poet ester layd in consulting a levyer guerre contre lui (que est overt-act de soy mesme) & actual assembling, & levying guerre." The case also mentioned the "case des regicides, Venner, Tonge & Vane, qe sur indictment de compassing de mort le roy, consulting a levyer guerre, ou actual assembling de guerre fueront evidence, & overt faits provant compassing mort le roy"[494] Likewise, in the *Case of Arden and Somerville and others*, "it was resolved by all the justices, that a meeting together of these accomplices to consult touching the manner of effecting it was an overt-act to prove it."[495] Finally, Hale gives a rationale why such an assembly was an overt act, which basically was constructed upon the same principle that this was the means to the end of killing the king:

> An assembly to levy war against the king, either to depose or restrain, or enforce him to any act, or to come to his presence, or to come to his presence to remove his counsellors or ministers, or to fight against the king's lieutenant or military commissionate officers, is an overt-act proving the compassing of the death of the king; for such a war is directed against the very person of the king, and he, that designs to fights against the king, cannot but know at least it must hazard his life.[496]

[491] Cited in 1 Hale PC 119.

[492] 1 Hale PC 120.

[493] Ib.

[494] Ib., 121.

[495] Ib., 122.

[496] Ib., 123.

In commenting the case of the London weavers who "did agree among themselves to rise and go from house to house to take and destroy the engine-looms… assemble themselves in great numbers… (and) did in a most violent manner break open the houses of many of the king's subjects… took away the engines and making great fires burnt the same," Hale explained that the court was divided between those judges who thought it was a case of levying war against the king, and those who though it was a mere riot. The latter opined that:

> If men assemble together and consult to raise a force immediately or directly against the king's person, or to restrain or depose him, whether the number of persons were more or less, or whether armed or unarmed, tho this were not a treason within this clause of the statute of 25 E. 3 (levy war clause), yet it was treason within the first clause of compassing the king's death, and an overt-act sufficient to make good such an indictment.[497]

In commenting the case of John Oldecastle, leader of a Lollard insurrection, Hale commented that "the indictment is principally founded upon that article of this statute of compassing the king's death, and yet the overt-act is an assembly to levy war, and actual levying of war." By that assembly it is meant "their first meeting to contrive their coming to St. Giles." By actual levying of war, it is meant "their actual marching in a body modo guerrino & modo insurrectionis."[498]

A question derived from this interpretation of the conspiracy to levy war as evidence of compassing the king's death was whether that included the cases in which there was a "levying of a war against the king merely by interpretation and construction of law."[499] Hale was contrary to that expansion of the law unless the prisoners "had conspired to have raised a war directly against the king or his forces, and assembled people for that purpose, tho no actual war had been caused by him."[500] On the other hand:

> A conspiracy of compassing to levy war against the king directly or against his forces, and meeting and consulting for the effecting of it, whether the number of conspirators be more or less, or disguised under any other pretense whatsoever, as of reformation of abuses, casting down inclosures particular or generally, nay of wrestling, football-playing, cock-fighting; yet if it can appear, that they consulted or resolved to raise a

[497] Ib., 146.

[498] Ib.,144. For further reference to this conspiracy to levy war as overt act, see also pp. 131, 139, 148.

[499] Ib., 123.

[500] Ib., 123. See also pp. 143-6.

> power immediately against the king, or the liberty or safety of his person, this congregating of people for this intent, tho no war be actually levied, is an overt-act to maintain an indictment, for compassing the king's death within the first clause of the statute of 25 E. 3 for this is the natural or necessary consequence, that he, that attempts to subdue or conquer the king, cannot intend less, than the taking away his life.[501]

3.3.1.5 The Field of Compassing the Death of the King

3.3.1.5.1 Conspiracy as a Type of Plan as form of Volition

As with Coke, the 'purpose' is referred to with the words *compassing, imagining, design, purpose,* and *intent.* But by contrast to Coke, the term *conspiracy,* and its derivative forms, becomes widely used as synonym of the former.[502] However, while those terms suggest both individual and collective agency, the meaning of *conspiracy* is sometimes restricted to those cases in which there was more than one person involved in the offense, as showed by the syntagmatic relations of the term in the sentences: "if men conspire the death of the king and the manner," or "if men conspire to imprison the king by force."[503]

3.3.1.5.2 Adhering the Enemy: Conspiracy as a Type of Bond

This use of the term *conspiracy* is related indeed to the treason of adhering the king's enemies in his realm, particularly within the context not of internal but of external enemies. In that context, the focus of the term is not so much on the concept of 'purpose' as it is on the idea of establishing an 'allegiance or bond' with the king's enemies and helping them as in "conspiring with a foreign prince to invade this kingdom."[504] This is the most traditional usage of the term as 'alliance or bond against an enemy'. That is why when discussing the liability for treason of foreigners living within the realm but subject to a king at war with the king of England, such as merchants and ambassadors, the preferred term to refer to such an 'alliance or bond' to help or assist the king's enemies is that of *conspiracy*.[505] In this context the idea that the defendants had conceived the death of the king is not as important to convey as that they had become accomplices of the foreign king. In both these cases, merchants and ambassadors are acting as proxies or agents of their monarchs who procure them to try to kill

[501] Ib., 148.

[502] Ib., 107, 109, 110, 112, 126.

[503] Ib., 109.

[504] Ib., 120. See also pp. 121-2.

[505] Ib., 93-6, 98.

the king or invade the realm. Thus, in the discussion of such liability of ambassadors, Hale uses the following language: "how far the priviledge of an embassador exempts him from penal prosecution as an enemy for such conspiracies or inconsummate attempts, that do not proceed farther than the machination, solicitation or conspiracy."[506]

3.3.1.5.3 Attempt: Conspiracy as a Part of Crime

In the same context, *conspiracy* referring to 'purpose' also appears as a term used within the attempt view of the treason of compassing the king's death. In this view, the crime is viewed not as a single event but as a sequence of events, the one leading to the other in a causal chain from the will to its execution and effect. The idea of different states in the commission of the crime is conveyed by the terms *consummate* and *inconsumate*. *Inconsummate* refers to the conception state, whereas *consummate* refers to its execution. That is, there is a distinction between the will that had not been effected, and that which had been put into execution. The former is called *conspiracy, machination, solicitation*; the later receives the name of *attempt*.[507] So, in that context, *conspiracy* is used to refer to a purpose or will which had not been put into execution and that deserves no punishment. And it should be recalled that in the volitive theory of the treason of compassing the king's death, *conspiracy* refers to a purpose which is a completed criminal action in itself. Syntagmatically, the idea of causal sequence is conveyed with expression like "attempts, that do not *proceed farther* than the machination, solicitation or conspiracy"[508] or "is a consummation thereof, tho possibly the *full effect* thereof do not *ensue*."[509] That is, in this view, the 'will' as a cause is executed, or proceeds, or ensues.

3.3.1.5.4 Evidence

'The fact in evidence of the will' is referred to with the expression *overt-act*. *Overt* has an epistemological value meaning judicially knowable and triable, and it is relative to the *secret* nature of the treasonous 'will' which is not knowable by humans. Though it is a procedural element, as said, it is made a part of the offence as it should be averted in the

[506] Ib., 97.

[507] Ib., 96-99.

[508] Ib., 97.

[509] Ib., 96.

indictment. In that sense, it is dependent on the concept of 'will'. The offence thus consists not only of a 'will', but also a 'fact' revealing that will. Thus, the defendant could traverse the evidence as well as plead legal points as to whether this was good evidence. Among the facts that had been considered as evidence of the treason of compassing the king's death, and which define the category of 'overt-act,' we need only to consider the case of assemblies and alliances to levy war against the king.

According to Hale, "an assembling together to consider how they may kill the king"[510] or "a meeting together of these accomplices to consult touching the manner of effecting it (the death of the monarch)"[511] is evidence of the 'will of the death of the king.' By construction, this is also the case of "consulting a levyer guerre contre lui… & actual assembling" or "consulting a levyer guerre, ou actual assembling de guerre,"[512] as well as "compassing to levy war against the king directly or against his forces, and meeting and consulting for the effecting of it"[513] It is important to note the ambiguity of such meeting of people which can be considered to be subsequent to the offense, or more or less simultaneous. Indeed, such assemblies usually are more or less simultaneous to the act of levying war, but subsequent to the purpose to kill the king. That is, 'a public meeting of accomplices to plan and/or execute the offence' which is referred to with the term *conspiracy*.[514] Thus, the term *conspiracy* is not only used to mean a kind of treason, and therefore made subordinate to the category of 'treason,' but it also done so as a type of 'over-act' or 'evidence of compassing'.

Alliance

3.3.1.5.5 Syntagmatic Relations: the Use of Bare

In connection with the 'overt act' is the term *bare*, which sometimes indicates the 'will of the death of the king' as opposed to acts in execution of it as in "a bare conspiracy

[510] Ib., 119.

[511] Ib., 122.

[512] Ib., 121.

[513] Ib., 148.

[514] Ib., 119, 122, 123, 131, 139, 145, 146, 148.

or machination against the prince, and an actual attempt of treason",[515] or as opposed to the 'overt-act.'[516]

3.3.2 Levy War

3.3.2.1 The Elements of the Treason of Levying War against the King

The *Treason Act* established as an act of treason when "man doe levy war against the Lord the king in his Realm… and thereof be probably attainted of open deed by people of their condition."[517] For analytical purposes, Hale divides this clause concerning levying of war in three main elements: the act of raising war, the purpose of that act which must be against the king, and the place of that act of treason which must be the king's realm.[518] The act of raising the war involves that a war is actually started.[519] Though Hale gives no direct definition of what war is, focusing only on determining at which point it could be considered to have started, it is clear that, in contrast to compassing, he means a collective action. There cannot be war raised by a single individual nor by a small number of individuals but by a multitude gathering or meeting at some place. That means that they should be in open war against the king, that is, they should have declared somehow their hostility towards the king appearing as his enemies. In other words, there must be an armed force.

3.3.2.1.1 More Guerrino Arraiati

The issue of the act of levying of war is "a question of fact… which may be difficult to enumerate or to define; and commonly expressed by the words more guerrino arriati"[520] Specifically, there must be "such assembly as carries with it speciem belli, as if they ride or march vexilis explicates, or if they be formed into companies, or furnished with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds, pikes, and are so circumstanced, that it may be reasonably concluded they are in a posture of

[515] Ib., 98, 99; see also p. 97.

[516] Ib., 111, 112.

[517] Treason Act st 5 c 2, 3.

[518] 1 Hale PC, 130, 140.

[519] Ib., 133. 148.

[520] Ib., 130-1.

war."[521] Elsewhere, Hale says that there is levy of war "where people are assembled in great numbers armed with weapons offensive, or weapons of war, if they march thus armed in a body, if they have chosen commanders or officers, if they march cum vexilis explicatis or with drums or trumpets, and the like."[522]

But there was room for interpreting when an assembly of people was in position of war beyond being that organized. This was the case if the people assembled had the purpose "to get arms to arm themselves."[523] The issue as to whether "the greatness of their numbers, and their continuance together doing these act may not amount to more guerrino arraiati may be considerable."[524] In this regard, it had been argued that when people assembling "had no ensigns, yet their multitudes supplied that defect, being able to do that by their multitudes, which a lesser number of armed men might scarce be able to affect by their weapons,"[525] though Hale doubted it.[526]

3.3.2.1.2 Purpose

In addition to an armed force, there must be a purpose "expresly and directly" against the king, "as raising war against the king or his general and forces, or to surprise or injure the king's person, or to imprison him, or to go to his presence to enforce him to remove any of his ministers or counsellors."[527] This requirement specifically excludes a "private quarrel, as many times it happend between lord marchers, tho it be vexillis explicates, it seems no levying of war against the king," as well as "a private and particular design, as to pull down the inclosures of such a particular common."[528] Those are a matter of the law of riot and unlawful assembly.

[521] Ib., 150, 2.

[522] Ib., 131.

[523] Ib., 145, 150; p. 131 seems to contradict this tenet.

[524] Ib., 131.

[525] Ib., 144.

[526] Ib., 145.

[527] Ib., 131-2; see also p. 152.

[528] Ib., 131; see also pp. 125, 143-6, 149, 152.

The purpose of the armed force can also be understood "interpretatively and constructively, as when a war is levied to throw down inclosures generally, or to inhance servant wages, or to alter religion established by la."[529] This is considered to be "not so much against the king's person, as against his government."[530] The difference, therefore, between an unlawful assembly or a riot and an act of treason constructed as a levy of war against the king is that the purpose of the people assembled "is general against the king, because it is generally against the king's laws, and the offenders take upon them the reformation, which subjects by gathering power ought not to do."[531]

Another form of treason, as mentioned above, can be constructed when "men assemble together and consult to raise a force immediately or directly against the king's person, or to restrain or depose him, whether the number of the persons were more or less, or whether armed or unarmed, tho this were not a treason within the first clause of compassing the king's death, and an overt-act sufficient to make good such an indictment, tho no war was actually levied."[532] Such conspiracy is made a treason specially "by divers temporary acts of parliament, as 13 Eliz. During the queen's life, 12 Car. 2 during our king's life."[533] Furthermore, in the case of a constructive treason of levy of war against public policy, "the bare assembly to that intent (was not) a sufficient overt-act of levying of war; that was but an attempt and putting in ure, unless they had actually begun the execution of that intention, going about, practicing, or putting in ure."[534] Yet this treason to levy war against public policy was an act of treason by other statutes than the Treason Act.[535]

[529] Ib., 132; see also when "men levy war to break prisons," 133-4, or "journeymen assembled to pull down bawdy-houses," 134.

[530] Ib., 152.

[531] Ib., 133.

[532] Ib., 145, also pp. 151-2).

[533] Ib., 132; see also p. 148.

[534] Ib., 125; see also p. 155.

[535] Ib., 153, 322, 323.

3.3.2.2 The Field of the Levy War in Hale

3.2.2.2.1 Levy War as a Type of Assembly

In Hale, *levy war* clearly appears as a type of 'criminal assembly'. Since Hale does not use this or any other name or expression to refer to this as a category it may seem that it is a made-up category. We will later see that the taxonomy of types of *levy war* and the comparison with the offense of *unlawful assembly* which is not distinguished from *riot* here, point out to such a superordinate. Grammatically, *assembly* is a collective noun for the concept of 'a group of people meeting at some place to some common purpose.' So, Hale uses to define *levy war* as "people assembled in great numbers,"[536] and to instantiate this abstract category with examples as when "a great number of weavers… assemble themselves in great numbers at some places, and at others."[537]

But what type of 'criminal assembly' is the *levying of war*? In order to distinguish the hyponyms of 'criminal assembly', Hale focuses on three aspects of the 'assembly': the manner or mode of assembling, the purpose of such assembling, and the normative source or the offence (and the type of offence). Thus, in the manner, there are two opposed elements: the military and the riotous assembly, whereas in the purpose, there are the assemblies against the king and the assemblies within the context of private disputes.

Manner

The military assembly, or military force, "is expressed by the words *more guerrino arraiati*."[538] As said, Hale explains this concept in an extensive way so that the assembly is considered to be levy war if "they ride or march vexilis explicates, or if they be formed into companies, or furnished with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds, pikes, and are so circumstanced, that it may be reasonably concluded they are in a posture of war."[539] A doubtful case is that in which none of the abovementioned situations is present but only "the greatness of their numbers, and their

[536] Ib., 131.

[537] Ib., 143.

[538] Ib., 130.

[539] Ib., 150.

continuance together doing these acts."[540] For Hale, this is rather a case of a riotous assembly as when the mentioned weavers who commit acts of civil disorder:

> In a most violent manner break open the houses of many of the king's subjects, in which such engine-looms were, or were by them suspected to be, they took away the engines and making great fires burnt the same, and not only the looms, but in many places the ribbands made thereby and several other goods of the persons, whose houses they broke open.[541]

PURPOSE

The other aspect on which Hale focuses on to distinguish the assembly which amounts to levy of war is its purpose, which can be either public or private. The public purpose can be "expressly and directly" against the monarch and his officers,[542] but it can also be construed when such assemblies and public disturbances are "not so much against the king's person, as against his government.[543] It is to be noted that the same act intended by the assembly of people can be either considered private or public "as for the purpose not to pull down all houses or mills, but some special ones; which they thought offensive to them; nor to abate the rents of all manors, but of some particular manor, whereof they were tenants; nor to make a general abatement of the prices of victuals or corn, but in some particular market, or within some precinct."[544]

In conclusion, the category of 'criminal assembly' is structured around the distinction between 'assembly in *more guerrino* against the king/government,' which is *levy war*, and an 'unlawful assembly or riot against a private interest'. This in turn leads to two types of offence: a treason and a misdemeanor. Thus, the opposition between the *unlawful assembly/riot* and the *levying of war* entails the gradual opposition between *misdemeanor/treason*. Furthermore, the dimensions upon which this opposition is based entail a further opposition between *means/purpose*, so that assemblies are categorized and labelled as *treasons* or *misdemeanors* depending either on the *manner* (*more guerrino* vs

[540] Ib., 131. See alsop.144.

[541] Ib., 143.

[542] Ib., 131-2; also p. 152.

[543] Ib., 152. See also 132.

[544] Ib., 125. See also pp. 123, 130-1, 133-4, 143-6, 149, 152.

non-more guerrino), or on the *purpose*. Finally, this last category implies another opposition which is reflected here lexically, between *private/public*, indicating whether it affects the whole of the body politics or only an individual.

3.3.2.3 Source: Compassing to Levy War/Levy War

It has been said earlier that assembly designates a collective entity. More specifically, the concept of 'assembly' includes a form of meeting in which people, whether in a larger or a smaller number, gather together to deliberate a course of action (a sense that might or might not be distinguished from the course action and the general sense), or, as Hale puts it, "if men assemble together and consult to raise a force immediately or directly against the king's person, or to restrain or depose him, whether the number of the persons were more or less, or whether armed or unarmed,"[545] as in the case of "a great numbers of the weavers in and about *London* being offended at the engine-looms… did agree among themselves to rise and go from house to house to take and destroy the engine-looms."[546] When this latter sense of *assembly* is invoked, it appears as synonymous with *conspiracy* (and sometimes *confederacy*), as in the sentence, "a bare conspiracy or consultations of persons to levy a war, and to provide weapons for that purpose;"[547] or in the sentence, "Robert Burton and others, that conspired to assemble themselves and pull down inclosures, and to gain arms at the lord Norris's house."[548]

In addition to the clause of the Treason Act declaring a treason the act of levying war against the king, during Tudor England, several statutes made compassing the death of the king a treason. Thus 1 & 2 P&M c 10 (1554) established that it was treason "if any Person during the Marriage between the King and the Queen's Majesties do compass or imagine… to levy War within this Realm against the King or Queen." Similarly, 1 Eliz 1 c 1 (1558) considered it a treason to compass, imagyn, invent, devyse or intend… to levye Warre against her Majestie within this Realme". These statutes were in force only during the life of these monarchs, but this clause was revived during the Restoration so that it was made a treason to

[545] Ib., 146.

[546] Ib., 143.

[547] Ib., 131.

[548] Ib., 133.

"compass, imagine, devise, or intend… to levy war against his majesty within the realm or without.

Though the terminology of this statute remained within the domain of the *compassing* the death of the king clause of the Treason Act, with the usual synonyms for that term (*imagine, invent, device, intent*), the fact that it was related to the other clause of levying war created some difficulties and raised a series of legal issues that were determined in court. Indeed, these problems are displayed by the changes in the terminology used to refer to that clause. By the time Hale writes, he almost never used the term *compassing* but rather talks about "*conspiring* to levy such war."[549]

The first question that arises because of this statute is whether a conspiracy to commit a constructive treason falls within the scope of those statutes. Apparently, the point as to whether "the conspiring to levy war for those purposes (was) treason within that clause of the act of 13 Eliz 1 c 1" was positively resolved in "*Burton's* case and *Grant's* case… and the like resolution was in the case of the apprentices that assembled more guerrino to pull down bawdy houses."[550] Hale, however, argued that the statute:

> 3 & 4 Ed. 6. Cap. 12 which makes special provisions to make assemblies above twelve to alter the laws and statutes of the kingdom, or the religion established by law, or if above forty assemble for pulling down inclosures, burning houses, or stacks of corn, treason… these offenses being the same with those adjudged treason in Burton's case… why was it thought necessary for an act of parliament 3 & 4 Ed. 6 to make it treason under certain qualifications.[551]

Furthermore, he argued that though:

> the unlawful ends of these assemblies thus punished by 3 & 4 Ed. 6. and 1 Mar. were much the same with those of Burton and Grant and others, that were adjudged treason, yet the difference between the cases stood not in that, but in the manner of their assembly… because it was a conspiracy to arm themselves and levy war more guerrino… but those thus heightened to treason by 3 & 4 E. 6… were not intended of such, as were more guerrino arraiati, nor a levying of war tho their multitudes were often great, and tho they did put in ure the things they conspired to effect, and so were

[549] Ib., 132.

[550] Ib., 153.

[551] Ib., 153.

but great riots and not levying of war within this clause of 25 Ed. 3 and therefore those acts inflicted a new and father punishment on them[552]

Summing up, Hale argued that those cases had not been decided under the presumption that a constructive conspiracy was within the Elizabethan statute, but rather as conspiracies to levy war in an express sense since the purpose of the people so assembled was to arm themselves, and this would turn them into a sort of military force. Elsewhere he also argues that from that purpose it could be inferred that they intended to act against the king since "an assembly of people thus arm themselves, and make good their attempts (meaning purpose or intent) by a military force, and to resist and subdue all power, that shall be used to suppress them."[553]

For Hale, a similar case was when "divers apprentices were committed for great riots, (and) divers other apprentices conspired to deliver them out of prison, to kill the mayor of London, to burn his house, to break open two houses near the Tower, where there were arms for three hundred men, and to furnish themselves." In this case "it was resolved, that this was treason within the statute of 13 Eliz., for it was an intention to levy war, and altho they intended no harm to the person of the queen, yet because it concerned her in her office and authority, and was for such things, which the queen by law and justice ought to do, it was a levying war against the queen."[554]

The second question that arises is whether the statutes creating the treason of compassing to levy war were subject to the same overt-act requirement as the Treason Act was. This conspiracy to get arms was indeed considered "an overt act proving this conspiracy to levy war."[555] And it was further interpreted that the statutes regulating the punishment of the conspiracy to levy war required the indictment "being accompanied with an overt-act evidencing it… (that) must be specially laid in the indictment, and proved upon evidence.[556] In other words, in order to accommodate the cases of journeymen assemblies which had been convicted for treason under these statutes, an express intent of levying war had been

[552] Ib., 153-4.

[553] Ib., 150.

[554] Ib., 322-3. See also p. 146.

[555] Ib., 149.

[556] Ib., 148. See also p. 150.

constructed, and the basis upon which the inference had been drawn became an overt act evidencing it: the assembly of people to arm themselves. In other words, an assembly of people with the intent to arm themselves was considered evidence that this was an assembly to levy war against the king.

A third question, somewhat related to these cases was whether the conspiracy to levy war was in some form related to the Treason Act. On this point, it was considered that "if men assemble together and consult to raise a force immediately or directly against the king's person, or to restrain or depose him, whether the number of the persons were more or less, or whether armed or unarmed, tho this were not a treason within the first clause of the statute 25 E 3. Yet it was treason within the first clause of compassing the king's death, and an overt-act sufficient to make good such indictment, tho no war was actually levied."[557] However, though Hale had argued that Burton's case had not been decided on the grounds of their constructive purpose, here he argues that "if be a levying of a war against the king merely by interpretation and construction of law, as that of Burton, and others to pull down all enclosures… this seems not to be an evidence of an overt-act to prove compassing the king's death… and Burton's case 39 Eliz. seems to intimate as much, because they took him to be indictable only upon the statute 13 Eliz. c. 1 for conspiring to levy war against the queen, whereas if this had been an overt-act to prove the compassing of the death of the king, the fact had been treason within 25 Ed. 3 as surely it would have been, if he had conspired to have raised a war directly against the king or his forces, and assembled people for that purpose, tho no actual war had been caused by him."[558]

A fourth question that arises, derived from the latter, is whether the assembly to levy war falls within the levy war clause of the Treason Act. The opinion Hale holds here is that "a conspiracy or confederacy to levy war against the king is not a levying of war within this clause of the statute of 25 E. 3 for this clause requires a war actually levied."[559] Thus he bases

[557] Ib., 145. See also pp. 122-3, 151, 2.

[558] Ib., 123.

[559] Ib., 148.

this on the argument that, if this had been the case the statutes that "made conspiring to levy war… to be treason." would not have been necessary. [560]

A further question related to the problem of the constructive treason, is whether an assembly to commit a constructive levy war can be considered an overt-act making good the levy war clause of the Treason Act. Hale is not persuaded of this point: "whether the bare assembling of an enormous multitude for doing of these unlawful acts without weapons, or being more guerrino arraiati, especially in case of interpretative or constructive levying of war, be a sufficient overt-act to make a levying of war within this act, especially if they commit some of these acts themselves, is very considerable and seems to me doubtful."[561] Hence, Hale interprets that the Treason Act distinguishes between the "bare assembly" to levy war (whether constructive or not) and the "overt-act of levying of war," which was "but an attempt and putting in ure" of the intent.[562]

3.3.2.3.1 Conspiracy as Co-hyponym of Treason

The idea of *conspiracy* as synonymous with *assembly* within the discussion of the treason of *compassing to levy war* implies that it becomes a co-hyponym of *'*criminal assembly' along with the two types of *levy war* and the *unlawful assembly*. And, at the same time, it can be considered a type of treason with the co-hyponyms *compassing the death of the king*, and *levying of war*, which are distinguished by reason of their source.

And also, another kind of assembly, that to commit constructive treason, becomes a type of conspiracy to levy war, so that this category is potentially divided into conspiracy to express and constructive levy of war.

3.3.2.3.2 Conspiracy as a Stage of Levy War: Bare Assembly, Assembly to Levy War, Unlawful Assembly, Levying of War

So far, we have seen that the term *conspiracy* is synonymous with *assembly*, particularly when the latter means 'meeting of people to deliberate to some purpose'. Underpinning the issue of the conspiracy to levy war was the problem of determining at what

[560] Ib. See also p. 133.

[561] Ib. 155.

[562] Ib. 135.

point an assembly of people became a levy of war. We have thus far seen the opposition, based on the manner and the purpose, between the *unlawful assembly* and the *levy of war*, which, it should be recalled, referred to a group of people assembled with arms and the purpose to raise war against the king or against the public. Now we have a new opposition between *assembly*, sometimes accompanied by the marker *bare*, or *mere* and the *assembly to levy war*, on the one side, and between the *assembly to levy war* and the *levy war* on the other. This latter entails the part-whole relationship between a stage (*conspiracy to levy war*, *execution, levying of war*) and the offense understood as a process.

3.3.2.3.3 Conspiracy as Evidence of Treason

At the same time, this *conspiracy to levy* becomes an expression within the field of 'compassing the king's death,' where it assumes different lexical relations as evidence of the latter. Furthermore, within the field of the 'criminal assembly,' the 'assembly to arm themselves' becomes evidence of the *conspiracy to levy war*.

3.3.3 Conspiracy as a Type of Criminal Social Relationship

In addition to the volitive and collective meanings of *conspiracy*, we find instances of its use as indicating the relationship existing between the accomplices of a crime as *conspirators.* Thus, commenting the treason of killing a chancellor in *Treason Act*, Hale exposes that:

> This statute extends only to the actual killing of some of these officers, and therefore conspiring to kill any of these without actuall killing of any of them is not treason; but if many conspire to do the act, and one of the conspirators actually do it, this seems to be treason in them all, that are abettors or counsellors to do the act.[563]

On the other hand, it can also refer to the relation of procurement or solicitation in the context of petit treason, as "if a wife conspire to kill her husband, or a servant to kill his master, and this is done by a stranger in pursuance of that conspiracy" or "the wife and a servant conspire the death of the husband, being his master, and the servant effect it in the absence of the wife," or "the servant and a stranger, or the wife and a stranger conspire to rob the husband or master, and the servant or wife be present and hold the candle, [while the husband or master is killed]," or "the wife or servant conspire with a stranger to kill the

[563] Ib., 230; See also p. 133.

husband or master, if the wife or servant be in the same house, where the fact is done, tho not in the same room."[564]

3.4 High Treason in Hawkins

3.4.1 The Components of Treason: Definition of Treason

In Hawkins's classification, treason was a capital private offense against the king. In this he did not separate from the tradition that stemmed from Coke, who had conceived it as a sort of murder. However, it was clear that this type of offense had greater implications for the community, as shown in the construction of levy war. In any case, the field of these offences was divided into treasons and felonies.[565] Of the latter, the Henry VII' statute concerning the confederacies within the king's household was further classified as an offense against the Privy Council rather than as against the king directly.[566]

3.4.2 The Source of Treason: Narrowing Thesis

Like the other authors, Hawkins believed that there was an uncertain and broad high treason at common law, and that the statute *Treason Act* narrowed its scope to a limited number of cases. And this statute was considered the law at that time.[567] However, when it came to analyzing the different clauses of that statute, Hawkins departed from his predecessors and reduced the types of treason to four: "that which immediately concerns the king, his wife, or children," "that which concerns his office in the administration of justice," "that which concerns his seal," and "that which concerns his coin." Furthermore, he considered that the three latter are constructions of the first, for which he called them "Interpretive Treasons."[568] This is consistent with the view that treason was a private, rather than a public, offense. This notwithstanding, he divides, for analytical purposes, the first treason in three clauses which roughly correspond to *compassing the king's death*, *levying of war against the king*, and the problem of the *overt-act*.

---

[564] Ib., 378-80.

[565] 1 Haw PC c 2.

[566] 2 Haw PC c 2 s 27.

[567] 1 Haw PC c 2 ss 1-2.

[568] Ib., s 2.

3.4.3 Volitive Theory of compassing the king's death

Hawkins holds a volitive view of the compassing the king's death, arguing that *compasse* and *imagine* in the *Treason Act* "have been so strictly followed, that where a king has been actually murdered, yet not the killing him, but the compassing his death had in the indictment been laid as the treason, and the killing as an overt-act."[569] Thus, he also presumes the rule that "some overt act must be alleged in every indictment of high treason, in compassing the death of the king, &c. of levying war, or adhering to the king's enemies."[570]

3.4.4. Are Words Overt Act? Words are Acts

As with the other authors, Hawkins spends more time discussing what does amount to an overt act of *compassing* the death of the king. Among the *facts* that clearly amount to overt acts proving the *compassing* were "conspiring the king's death, and providing weapons to effect it, or sending letters to incite others to procure it, or actually assembling people in order to take the king into their power… the levying war against the king's person; or the bare consulting to levy such war; or meeting together and consulting the means to destroy the king and his government; or assembling with others, and procuring them to attempt the king's death"[571] Furthermore, "such compassing the king's death may be manifested not only by overt acts of a direct conspiracy to take away his life, but also by such as shew such a design as cannot be executed without the apparent peril thereof as… assembling men together in order to imprison or depose the king"[572] That is, he includes those acts that had been constructed as intended to kill the king because of potentially leading to the death of the king.

In the way Hawkins has framed these examples there is already a hint of what he considers the "great question" concerning the overt acts: "whether words only spoken can amount to an overt act of compassing the king's death"[573] Here Hawkins draws a difference between what might be called opinions or "words spoken only in contempt and disgrace of the king, and not showing any purpose to rebel, or any way to hurt his person, or disturb his

[569] Ib., ss 8-10.

[570] Ib., s 29.

[571] Ib., ss 30-31.

[572] Ib., ss 8-9.

[573] Ib., s 33.

government,"[574] which rather are "punishable as great misdemeanors, and tending to raise doubts, and to disturb the government,"[575] and what might be called communicative acts, such as "word joined to an act (that) may explain it" and "words of persuasion to kill the king, or manifesting an agreement, or consultation, or directions to that purpose."[576] According to Hawkins, these words should be considered as overt acts because they "are the most natural means of expressing the imagination of the heart."[577] The point here being that that he who "by command or persuasion induces another to commit treason… does not act but by words."[578]

In other words, Hawkins considers that words are also acts that may disclose the treasonous purpose, not in the sense of public speech, but rather in the context of a plot. This, as we will later see, has bearing on the field of *conspiracy.*

3.4.5 Nonspecific Levy War

Hawkins gives no detailed description of the elements of the treason of levy war, and makes distinction between *express*, and *constructive* levying of war, which for him amounts to "directly rebel against the king, and take up arms in order to dethrone him, but also in many other cases, those who in a violent and forcible manner withstand his lawful authority, or endeavor to reform his government."[579] Nevertheless, Hawkins keeps the distinction between public and private purpose to distinguish treasonous from unlawful assemblies: "those also who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, and of their own authority attempt with force to redress it… but where a number of men rise to remove a grievance to their private interest, as to pull down a particular inclosure… they are only rioters."[580] He also shares the opinion that "a bare conspiracy to levy war" was no treason under the Treason Act, but that "a conspiracy to levy

[574] Ib., s 34.

[575] Ib., s 35.

[576] Ib., s 37.

[577] Ib., s 38.

[578] Ib., s 39.

[579] Ib., s 23.

[580] Ib., s 25.

war against the king's person may be alleged as an overt act of compassing his death, and that in all cases if the treason be actually completed, the conspirators, &c. are traitors as much as the actors."[581]

3.4.6 The Field of Conspiracy: Act of Communication

The fundamental change in Hawkins is that he considers *conspiracy* as a type of act of communication encompassing *persuasion*, *agreement*, *consultation*, *directions*, *procuring*, *commands,* and which frequently takes place in the context of a *meeting* or *assembly*. In other words, it involves those acts of communication that take place between accomplices. This, it should be noted, was consistent with the view that the *conspiracy to levy war* was an overt-act of compassing the king's death. And this sense of deliberative *assembly* or *meeting* may also explain why Hawkins does not explain *levy of war* in terms of a type of *assembly*, but an act of *rebellion*, or *insurrection* against the king. He likewise does not distinguish between *express* and *constructive* treason, because the latter equally "tends to a downright rebellion," by contrast to what he does not term *unlawful assembly* but *rioters.*

3.4 High Treason in Foster

3.4.1 Foster's Definition of Treason

Foster defines high treason in traditional terms as "an Offense committed against the Duty of Allegiance,"[582] and divides it into the several kinds of different traditional treasons there are. Here, I will discuss the treason of compassing the death of the king, and that of levying of war.

But before so doing, it should be noted that Foster's traditional definition of treason as a violation of the duty of allegiance to the king hides a different understanding as to what was the real rationale for this offence to exist. Thus, in explaining why the king deserves special protection by this law of treason he argues that "the King is considered as the Head of the Body Politick, and the Members of that Body are considered as united and kept

[581] Ib., s 27.

[582] Foster, 183.

together by a Political Union with Him and with each other. His Life cannot, in the Ordinary Course of Things, be taken away by Treasonable Practices without involving the whole Nation in Blood and Confusion."[583]

In this passage, there is a new actor, the political community, considered either as a body politick, and in the traditional organic commonwealth, or as a Nation. The seriousness of the offense is not only measured by the rank of the person against whom it is committed, but by the nature of its consequences: the dissolution of the civil bonds, of the social compact, into civil war.

Therefore, there is a change in the structure of the category of 'treason,' which now designates acts against the political community. As a type of *offence,* the difference between it and the other types as *felonies* and *misdemeanors* is that it is against this political community. That is, such acts may bring about the horrors of a civil war. Indeed, this bears on the language with which the hypernyms of treason are described. Particularly that of *levying war,* and the *constructive levying of war*. The latter is now less a kind of act against the king because it is against the public, and more of an act against the existence of the community as a whole. Thus, they are described as "insurrections… for redressing *National* Grievances… or for the Reformation of Real or Imaginary Evils of a Publick Nature and in which the *Insurgents* have no Special Interest", as "*risings* in order to effect these Innovations of a Publick and General Concern,"[584] or as "intending to *Disturb the Peace and Public Tranquility of the Kingdom*… to Levy and Raise War, Rebellion, and Insurrection."[585]

3.4.2 The Attempt View of Compassing the King's Death

3.4.2.1 The Voluntas *Interpretation of Compassing*

Foster adhered to Coke's interpretation that the treason of compassing the king's death was an application of the doctrine that the will stands for the act. In his own words:

> The ancient Writers in treating of Felonious Homicide considered the Felonious Intention manifested by plain Facts, not by bare Words of any kind, in the same light

[583] Ib., 195. See also the description of seditious writings as having "as direct a Tendency to involve these Nations in the Miseries of an Intestine War," Foster 201.

[584] Ib., 211.

[585] Ib., 214.

> in point of Guilt, as Homicide itself. The Rule was *Voluntas reputatur pro Facto*. And while this Rule prevailed, the Nature of the Offense was expressed by the Term Compassing the Death[586]

Therefore, the statute *Treason Act*, simply put, declared the common law of homicide, which in the case of "common persons" had been "laid aside as too Rigorous" but "in the Case of the King, Queen, and Prince, the Statute of Treasons hath with great Propriety retained."[587] Under this view, this offence appears as a kind of homicide, and as such, an offense against the individual which in this case happens to be the king.

3.4.2.2 The Overt Act as 'Attempt'

In this passage, it seems that Foster's invocation of the doctrine of *voluntas pro facto* does not help to depart from the narrow view that the Treason Act punishes the purpose as "manifested by plain Facts,"[588] that is, the volitive view of compassing the king's death. However, it is clear that there is a requirement that "an Overt Act must be Alledged and Proved. For the Overt-Act is the Charge to which the Prisoner must apply his Defense."[589] Here the over act does not appear as the necessary evidence, but as the gist of the offense to which the prisoner should apply his defense. In other words, it is against this that the prisoner must declare his innocence. This is so because for Forster, the overt act is not averted "merely as Matters of Evidence, tending to discover the Imaginations of Intentions."[590] Rather, he defines the overt act as "the Means employed by the Defendant for executing his Traiterous Purposes" or as "he means made use of to effectuate the Intentions and Imaginations of the Heart."[591]

3.4.2.2.1 Attempt as Means to an End

Foster clearly conceives the overt act as an attempt, and the attempt as the real punished conduct. But Foster's view of the attempt is not Coke's. For the latter, it was an act in execution of the criminal purpose. And by such acts he mainly understood failures. Thus,

---

[586] Ib., 193.

[587] Ib.

[588] Ib.

[589] Ib., 194.

[590] Ib., 203.

[591] Ib., 194.

his conception of the attempt was that of a crime which had already been put into execution, and by that he understood mainly failure. In other words, it was about acts that have a certain tendency and that, if successful, will bring about the criminal effect. Foster's concept of 'attempt' as the means to an end was broader. It included not only those actions directly involved in the execution of the offense, but also preparations. Indeed, the rule to which Foster was hinting at is that the means involved in the commission of a crime is as punishable as the crime itself. Or, that within the scope of an offense, all the acts involved in its execution fall inside, whether they are preparations or not.

In other words, both Coke and Foster consider that the 'attempt' is the execution of a criminal purpose or will. But they differ as to the point at which the execution actually begins. For Coke, it begins with an act that has the tendency, that is, which, if successful, will bring about the effect of homicide. This, in other terms, means a failure. For Foster, the execution involves all the intermediate acts that lead to that act which have the tendency of leading to the homicide. This explains why Foster interpreted that the doctrine of *voluntas pro facto* "considereth the wicked Imaginations of the Heart in the same Degree of Guilt as if carried in the same Degree of Guilt as if carried in actual Execution, from the moment Measures appear to have been taken to render them Effectual."[592]

However, Foster also entertains the view that the attempt is an act which tends to homicide. He does so mainly because he has to give leeway to the case law of treason:

> The Care the Law hath taken for the Personal Safety of the King is not confined to Actions or Attempts of the more Flagitious Kind, to Assasination or Poison, or other Attempts directly and immediately aiming at His Life. It is extended to every thing Willfully and Deliberately don or attempted, whereby His Life may be endangered. And therefore the entering into Measures for Deposing or Imprisoning Him, or to get His Person into the Power of the Conspirators, these Offences are Overt-Acts of Treason within this Branch of the Statue.[593]

In this passage, Foster faces the problem that his theory of the overt-act as a means to an end does not explain why plots to imprison or depose the king had been punished as compassing the death of the king. Thus, he has to embrace the construction that these acts

[592] Ib., 195.

[593] Ib., 195-6. See also p. 196, where he brings within this rule "Entering into Measures in concert with Foreigners or others in order to an Invasion of the Kingdom."

have the tendency or put at risk the life of the king. But then, as illustrated by the first lines of this passage, he also embraces the view that attempts are mainly failures; acts which might directly cause the death of the king.

Conspiracy as Plot

This conception of the *overt act* as a means to the end of regicide led Foster to conclude that:

> If conspirators meet and consult how to Kill the King, though they do not then fall upon any Scheme for that Purpose, this is an Overt-Act of Compassing his death; and so are all Means made us of, be it Advice, Persuasion or Command, to Incite or Incourage others to commit the Fact, or join in the Attempt.[594]

Furthermore:

> Every Person who but Assenteth to any Overtures for that Purpose will be involved in the same Guilt… If a Person be but once Present at a Consultation for such Purposes and Concealeth it, having had a previous Notice of the Design of the Meeting, this is an Evidence proper to be left to a Jury of such Assent, though the Party say or do Nothing at such Consultation. The Law is the same if he is Present at more than One such Consultation, and doth not Dissent or make a Discovery.[595]

In these two passages, Foster argues that the conspiracy falls under his definition of *overt act*. *Conspiracy* here is understood as those preparatory acts that might be labelled as planning or plotting the execution of the crime. This includes the meetings of the accomplices and the consulting or delivering about how to do it, but also those people involved in the plot by way of delegation and procurement. In general, it can be said that it includes, with the exception of the meeting, which is a physical action, all those acts of communication associated to planning or plotting. It should be noted that the plot or conspiracy works here at two levels: as an overt-act or attempt of regicide, punishable as treason, and as evidence of the participation in such an attempt. This is why the accomplices are called conspirators. It is not only actively plotting, but the mere fact of attending the meeting, if the person is appraised of its purpose, that makes that person liable even if she is not involved in the plot. The law presumes, according to Foster, that those who attend give their consent to the plot.

[594] Ib., 195.

[595] Ib.

3.4.2.2.2 Words

Words not Relative to Action Rule

Regarding the issue of whether words are overt-acts of compassing the king's death, Foster says that he:

> Choose to adhere to the Rule which hath been laid down on more Occasions than One since the Revolution, that Loose Words not relative to any Act of Design are not Overt-Acts of Treason. But Words of Advice or Persuasion, and all Consultations for the Traiterous Purposes treated of in this Chapter are certainly so. They are uttered in Contemplation of some Traiterous Purpose actually on Foot or Intended, and in Prosecution of it.[596]

This requirement, which he attributes to Holt's ruling[597] that words to be considered an overt act of compassing the death of the king, nicely fits into Foster's definition of the overt-act as a means to an end. In that sense, he argued that though many:

> considered the Over-Acts required by the Statute, meerly as Matters of Evidence, tending to discover the Imaginations of the Heart… I conceive they are not to be considered merely as Evidence, but as the Means made use to Effectuate the Purposes of the heart… upon this Principle Words of Advice or Incouragement, and above all, Consultations for Destroying the King, very properly come under the Notion of Means made use of for that purpose.[598]

These are the types of proceedings that earlier were considered as a conspiracy. The nature of conspiracy, as it appears here, is that of words that are actions, or instruments to advance the treasonous purpose. Indeed, this view of conspiracy as acts of communication, and of the overt-act as an attempt, and of the attempt as means to an end, is a better way to justify the doctrine according to which conspiracies to levy war are overt-acts of compassing the king's death.

Opinions

These "Loose Words not relative to any Act of Design" mentioned above express "at the worst, nor more than bare Indications of the Malignity of the Heart"[599] They "are often the Effect of meer Heat of Blood, which in some Natures otherwise well disposed, carrieth

[596] Ib., 200.

[597] Foster, 204.

[598] Ib., 203-204.

[599] Ib., 204.

the Man beyond the Bounds of Decency or Prudence. They are always liable to great Misconstruction from the Ignorance or Inattention of the Hearers, and too often from a Motive truly Criminal."[600]

In other words, these *loose words* are but opinions. The general principle is that mere opinion must not be punished for treason because they are not means to move forward a criminal purpose. However, when faced with the problem of "how far Words of Writings of a Seditions Nature may be considered as Overt-Acts within this Branch of the Statute," Foster admits that "Writing being a deliberate Act and capable of satisfactory Proof certainly may, under some Circumstances with Publication be an Overt-Act of Treason."[601]

Indeed, to justify this exception, Fosters is forced to abandon his requirement of a direct relation of words to facts, and to introduce new criteria. These seditious printed words, he argues, can have "a direct Tendency to involve… Nations in the Miseries of an Intestine War, to incite Her Majesty's Subjects to withdraw their Allegiance from Her, and to deprive Her of Her Crown and Royal Dignity." And therefore "maintained *Maliciously, Advisedly, and* Directly."[602]

As to the latter, there is a:

> difference between Words reduced in Writing and Words spoken… the Difference appeareth to Me to be very Great, and it lieth here. Seditious Writings are Permanent Things, and if Published they scater the Poison far and wide. They are Acts of Deliberation, capable of Satisfactory Proof, and not ordinarily liable to Misconstruction; at least they are submitted to the Judgment of the Court, naked and undisguised as they came out of the Author's Hands. Words are transient and fleeting as the Wind; the Poison they scatter is at the worst confined to the narrow Circle of a few Hearers. They are frequently the Effect of a sudden Transport, easily Misunderstood, and often Misreported.[603]

[600] Ib., 200.

[601] Ib., 198.

[602] Ib., 201.

[603] Ib., 204.

So that "In the Case of bare Words, Positions of this dangerous Tendency, though maintained Maliciously, Advisedly, and Directly, and even in the Solemnities of Preaching and Teaching, are not considered as Overt-Acts of Treason"[604]

Forster's main distinction was between words that are actions, and words that express opinion. The former can be considered instruments moving forward the criminal action, whereas the latter are only evidence of a corrupt heart. To account for certain legislation that had made seditious publications a treason,[605] Foster introduces a totally different argument: what effect might the printed words have on the public opinion, and therefore by construction, be acts of treason. Yet this hardly falls within any of the treasons of the Treason Act, nor can it be considered an attempt of any of those treasons.

In discussing this, Foster betrays a Whiggish disposition to adapt the old law of high treason to the new constitutional order after the Glorious Revolution, where the freedom of speech was to be one of the basic checks on the power of the monarch and the founding privilege of parliamentary life. After all, the law of treason had always had the purpose to protect the figure of the king, and it had been used to buttress his power. There is no better example of this disposition, and the energy and zeal he puts into it, than when he tries to refute the tenet going back to Coke that "at Common-Law, Words alone might be an Overt-Act of Compassing the King's Death," and that therefore, the *Treason Act* simply limited the application of the common-law so that "bare Words are not Overt-Act of Treason."[606] This view, indeed, Foster said—referring to Hawkins' theory that words are the best evidence of treason, "hath been urged with some Advantage by a Good modern Writer of Crown Law."[607]

This interpretation amounts to admitting that the same ancient law that protected the liberties of the subject, at the same time limited his freedom of speech by punishing "bare Words not relative to Actions" That is why he sets himself to demonstrate "that the Doctrine his Lordship hath advanced upon the Foot of Common-Law, is not supported by any of the

[604] Ib., 201.

[605] Ib., 201-02.

[606] Ib., 205.

[607] Ib., 207.

Authorities to which He hath appealed."[608] Indeed, he finds that many of those authorities support his view that when words had been considered treason it was because "a Consultation for taking away the King's Life undoubtedly was an Overt-Act at the Common-Law, and is so under Statute."[609]

3.4.3 Levy War

3.4.3.1 Manner

Like Hale, Foster considers that the act of levy war involves the act of the assembling of a number of people. However, Foster thinks that the distinction Hale makes between assemblies of people that are *more guerrino* is relevant for determining whether there is levy of war or not. This is particularly so because in recent cases "of constructive Levying of War, there was nothing given in Evidence of the usual Pageantry of War; no military Weapons, no Banners or Drums, nor any regular Consultation previous to the Rising. And yet the Want of those circumstances weighted nothing with the Court, though the Prisoners Council insisted on that Matter."[610]

This notwithstanding, it should be mentioned that elsewhere, he argues that "Insurrections in order to throw down All Inclosures, to alter the Established Law or change Religion, to inhance the Price of All Labour or to open All Prisons, all Risings in order to effect these Innovations of a Public and General Concern by an Armed Force, are in Construction of Law High Treason, within the Clause of Levying War." And among the reasons he gives for this construction, he states that "they have a direct Tendency to dissolve all the Bonds of Society, and to destroy all Property and all Government too, by Numbers and an Armed Force."[611]

Likewise, in giving an example of indictment to illustrate the overt-act requirement, he argues that in indictments of levying of war "it will not be sufficient to alledge Generally that the the (sic) Defendants did Levy War or Adhere. But in the former Case it must be

[608] Ib., 207.

[609] Ib., 206

[610] Ib., 208.

[611] Ib., 211.

alledged that They did Assemble with a Multitude Armed and Arrayed in a Warlike Manner and Levyed War."[612]

3.4.3.2 Purpose

The true criteria to tell when a number of people assembling can be considered to be an act of levying war is "Quo Animo did the Parties Assemble." Thus, "assemblies Bodies of Men, Friends, Tenants or Dependants, armed and arrayed in a Warlike Manner in order to effect somme Purpose or other by dint of Numbers and superior Strength" were no more than felonies or misdemeanors if their "Purpose (was) of a Private Nature."[613] This included "Risings to maintain a Private Claim of Right, or to destroy particular Inclosures, or to remove Nuances which affected or were thought to affect in point of Interest the Parties Assembled for those Purposes, or to break Prisons in order to Release particular Persons without any other Circumstance of Aggravation." It also included the case of the engine-loom weavers, which according to Forster was "a Private Quarrel between Men of the same Trade about the Use of a Particular Engine, which those concerned in the Rising thought detrimental to them."[614]

By contrast, "every Insurrection which in Judgment of Law is intended against the Person of the King be it to Dethrone or Imprison Him, or to oblige Him to alter His Measures of Government, or to remove Evil Councellors from about Him, these Risings all amount to Levying War within Statute."[615]

3.4.3.3 Constructive Treason

The above mentioned are acts of levy of war directly aimed at the king. However, as said earlier, Foster admitted that "insurrections likewise for redressing National Grievances… or for the Reformation or Real or Imaginary Evils of a Publick Nature and in

[612] Ib., 220.

[613] Ib., 208-9.

[614] Ib., 210.

[615] Ib., 210-11.

which the Insurgents have no Special Interest… are by Construction of Law within the Clause of Levying War. For they are levelled at the King's Crown and Royal Dignity."[616]

Though the conspiracy to levy war was considered an overt-act of compassing the king's death,[617] it was clear for Foster that "a bare Conspiracy for effecting a Rising for the Purposes mentioned… is not an Overt-Act of Compassing the King's Death." And that when "Conspiracies for these Purposes have been adjudged Treason" it had been based on "the Temporary Act of 13. Eliz. which made Compassing to Levy War… High Treason during the life of the Queen."[618]

3.4.4 The Field of Conspiracy

Conspiracy appears in Foster as 'preparation or attempt of compassing the death of the king carried about by means of words.' As a 'preparation or attempt', *conspiracy* appears as a part or stage in the commission of the crime, as opposed to the execution (which was Coke's view), and the consummation. This is a view of the crime, and particularly of the offense of treason, as a process rather than as a single occurrence. The view that every single step in that process was potentially criminal was coming across slowly, and there were different views as to why. Coke's view was that since intent was the central element, this was what mattered. However, he limited the meaning to failures. Foster had a different view: If the crime was a causal chain, and the first element of that chain was the intent or purpose, then all the links of that chain were connected to it. But this view depends on a different set of goals. The view of Foster is clearly that of prevention.

Furthermore, since this definition implies that, as a type of words which perform an action, *conspiracy* is opposed to *loose words* or *bare words*, which are the expressions Foster uses to designate the idea of expressing 'opinions'. It should be mentioned that the expression *loose words* is further divided into several hyponyms: according to the intent they are uttered with, they could be considered to have been uttered *maliciously*, according to their meaning

[616] Ib., 211.

[617] Ib., 210-11.

[618] Ib., 213.

or content they can be *seditious*, and according to their form they can be either *spoken* or *printed.*

The term *conspiracy* embraces two different kinds of acts of communication: The *meeting* and *consultation*, which can be roughly considered as a definition of what a 'plot' is, and those acts of communication which consist of *advice, command, procure, persuade*, and that can best be described as 'procurement or solicitation.' Participating in these activities—be the plotting or the solicitation--leads to the creation of a criminal relationship between the people involved in them, that of the 'accomplice,' which in Foster is also designated by the term *conspirator* as.

It should also be mentioned that this use of *conspiracy* as a type of acts of communication precludes in Foster the possibility that the term be used to refer to the 'assembly' as the genus of the treason of levying war. Consequently, the term is never used but to indicate the preparation of the levying of war. Regarding this, in the constructive levying of war, the 'assembly' is less important now, and this type of treason is described with dynamic terms indicating that in this case, there is more than an assembly, and that collective action has begun to take place, such as with *insurrection, rebellion,* and *rabble*.

3.5 Blackstone's High Treason

3.5.1 Definition of Treason

For Blackstone, high treason belongs to that type of offences that "especially affect the supreme executive power of the king and his government."[619] This is thus a definition that casts the offense in a modern way, from the constitutional point of view of the division of power. It is an interference or obstruction of a certain branch of government. Missing from this picture is the other branch of the British government. How can an offence of this nature, which according to Foster affected and put at risk the whole political community, not be against Parliament as well? As we will see, the answer lies in that some of the conducts that fall under the scope of high treason admit different interpretations, and might support one branch of the government against the excesses of the other.

[619] Ib., 4 Black Co 74.

Blackstone also adds that this offense "amount either to a total renunciation of that allegiance, or at the least to criminal neglect of that duty, which is due from every subject to his sovereign" Thus, he explains that allegiance is "the tie or ligament which binds every subject to be true and faithful to his sovereign liege lord the king, in return for that protection which is afforded him." From this he concludes that "every offence therefore more immediately affecting the royal person, his crown, or dignity, is in some degree a breach of this duty of allegiance."[620] This way of characterizing the offense of high treason, by contrast, entailed a feudal explanation of royal power which did not agree with the modern constitutional theories which Blackstone embraced, much less with the idea of government by consent (which as we will see later, was presupposed in the right to resist the abuse and oppression of power). Yet Blackstone does not seem troubled by this juxtaposition of medieval and modern elements, nor does he try to explain or reduce the medieval to the modern ones.

He divides the category of 'offenses against this duty of allegiance' into *treason*, *felonious injurious to the king's prerogative, praemunire*, and *misprisions and contempts*.[621] As Coke and Hale, Blackstone believes that the offense of treason was created "by the antient common law" and that the statute Treason Act had been enacted to declare and ascertain the common law because due to the legal uncertainty about the scope of the offense, "there was a great latitude left in the breast of the judges, to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons."[622]

3.5.2 Compassing the King's Death

As Coke, Hale, and Fosters, Blackstone divides treasons into six types framed unto the different clauses of the statute *Treason Act*. His definition of this treason falls into the volitive interpretation, for he defines the term *compass* as "the purpose or design of the mind or will, and not, as in common speech, the carrying such design to effect."[623] Therefore, the

[620] Ib.

[621] Ib.

[622] Ib., 75-6.

[623] Ib., 78.

overt act comes as evidence of a *compassing*, which as "an act of the mind, it cannot possibly fall under any judicial cognizance." According to Blackstone, the requirement of *overt act* is regulated by the Treason Act, which "expressly requires, that the accussed *be thereof upon sufficient proof attainted of some open act by men of his own condition*."[624] That means that, as Coke, he interprets the clause of open act extensively, not only including open acts of war, but also compassing the king's death.

Within this setting of the volitive treason in which the behavior regulated by the compassing the king's death clause is considered a type of intent or purpose, Blackstone assembles together different, and not totally consistent, views:

> To conspire to imprison the king by force, and move towards it by assembling company, is an overt act of compassing the king's death; for all force, used to the person of the king, in it's [sic] consequence may tend to his death, and is a strong presumption of something worse intended than the present force, by such as have so far thrown off their bounden duty to their sovereign; it being an old observation, that there is generally but a short interval between the prisons and the graves of princes.[625]

In this passage, there are several concepts of this treason combined. In the first sentence, Blackstone frames the offense as the execution of a plot. It should be recalled that in describing these acts of preparation, Hale considered that the acts in execution of the conspiracy to imprison the king were overt acts of that purpose to imprison the king, but by construction it also was an overt act of compassing the king's death. And yet the explanation of why such acts are interpreted as overt acts of compassing the king's death is the traditional one, according to which, since those imprisoning the king are willing to put at risk his life, they are closer to regicide and therefore they can be presumed to have the intent to kill the king. There is a third element that should be noticed in this passage. The means by which the conspirators plan to imprison the king are described as an *assembling company* or *force*, for which there is an element of levying war in this overt act. Finally, Blackstone conflates all this with Foster's approach to these treasons as 'preparations' or means to an end: "These is no question also, but that taking any measures to render such treasonable purposes effectual,

[624] Ib., 79.

[625] Ib., 78-9.

as assembling and consulting on the means to kill the king, is a sufficient overt act of high treason."[626]

This inserting of Foster's view within the volitive treason is further illustrated by Blackstone's approach to the issue as to whether words are overt acts of compassing the king's death. He thus frames the problem as "how far words, spoken by an individual, and not relative to any treasonable act or design then in agitation shall amount to treason."[627] So, in the case of Algernon Sydney, he explains the he was convicted because "some papers found in his closet… plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence as overt acts of that treason."[628]

However, Blackstone does not address the problem from the point of view of Foster's distinction between opinions and actions, but from the traditional argument as to the uncertainty and context-dependence of spoken words which "may be spoken in heat, without any intention, or be mistaken, perverted, or mis-remembered by the hearers; their meaning depends always on their connection with other words, and things… as therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason."[629] Likewise, he argues that written words are treasonable not because "if the words be set down in writing, it argues more deliberate intention: and it has been held that writing is an overt act of treason; for scribere est agere. But even in this case the bare words are not the treason, but the deliberate act of writing them."[630] For Blackstone, it is not the content of the words that makes them treason but the act and the purpose of making them public so that "being merely speculative, without any intention… of making any public use of them, the convicting the authors of treason upon such an insufficient foundations has been universally disapproved."[631] In other words, Blackstone draws a feeble

[626] Ib., 79

[627] Ib.

[628] Ib., 80-1.

[629] Ib., 79-80.

[630] Ib., 80.

[631] Ib., 81.

balance between opinion and the act of rendering it public, for the act cannot be considered treasonable without presuming that the content—the opinion—is treasonable.

3.5.3 Levying of War

Blackstone devotes little time to discuss this treason. He does not explain the concept of 'levying war', nor does he distinguish between it and the concept of 'constructive levying of war'. He also does not explain the difference between the "bare conspiracy to levy war" and 'levy war', and why the former "falls within the first, of compassing or imagining the king's death."[632] He rather goes on to say that levying war "may be done by taking arms, not only to dethrone the king but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances real or pretended." Then he justifies this treason in that "the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes."[633]

Apparently, levying war amounts to "taking arms", that is to some sort of insurrection or rebellion. But the focus here is not on the insurrection against the king, but rather against the executive power. The offense is that of trying to "interfere forcibly" in the sphere of government, especially because the law "has established a sufficient power, for these purposes, in the high court of Parliament." That is, to check the executive Power and reform the law is the business of Parliament. In this, the tension between Blackstone's rationale for treason as an act against the duty to stay true to the king and his constitutional view of the monarchy is manifest. Indeed, Blackstone here draws a constitutional line between such an unlawful interference with the government's powers for "private or particular grievances," and those "cases of national oppression" in which "the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people."[634] That is, the difference here is between the legitimate right to resist the tyranny of a monarch who tries to encroach upon the powers of the Parliament, and the illegitimate interference

[632] Ib., 82.

[633] Ib., 81-2,

[634] Ib., 82.

with the executive powers of the government. So, there is a legitimate case to violate that duty of alliance to the king when it comes to defend the constitution against him.

This same constitutional view appears in Blackstone's description of the distinction between an unlawful assembly or riot and the constructive levying of war (which again, he does not conceptualize in that way), which in the past was based on the distinction between the private or public purpose of those involved in it. Blackstone explains that:

> an insurrection with an avowed design to pull down all inclosures, all brothels, and the like; the universality of the design making it a rebellion against the state and an usurpation of the powers of government, and an insolent invasion of the king's authority. But a tumult with a view to pull down a particular house or lay open a particular inclosure, amounts at most to a riot; this being no general defiance of public government."[635]

Summing up, Blackstone has no formed theory as to what the nature of the offense of treason is, nor does it seem that he is concerned with this issue since he conflates the ideas from Coke, Hale and Foster without hesitation. It seems rather that the focus of his description of this offense are the constitutional theories as to when an insurrection against the government is justified and when it is indeed against the law of treason. Because whether certain acts amount to compassing the king's death or not depends indeed on the consideration as to whether the government is oppressive. And this includes what written opinion amounts to *treasonable words*, and what does not.

3.5.4 The Field of Conspiracy

3.5.4.1 Compassing

Compassing is a type of *purpose* which is synonymous with *design*. Thus, among other inherited properties, *compassing* belongs to the *mind* (synonymous with *will*). The structure of the *overt act*, as has been said, is not stable. It appears as an *act* in evidence of *compassing*, but also as an *act* in execution of *compassing*, and as an *act* to render effectual the *treasonable purposes.* In this sense, it is synonymous with *measures*. This later conception of the *overt act* appears in the distinction of the *words* that are a type of *overt act*: *words* related to *design* and those not related. There is a further distinction between *bare*

[635] Ib.

words, referring to the 'opinion expressed in words,' and the concept of 'public opinion,' or 'making public use of words.'

3.5.4.2 Levy War

Levy war is a type alongside *insurrection* and *rebellion* meaning 'taking arms'. The structure of *insurrection* is further distinguished by 'purpose' and by 'motive'. Thus, it can be an 'insurrection with the purpose to interfere in public matters and motivated by private grievances,' which is the *levy war*, or it can be an 'insurrection with a private purpose,' which is named a *riot*, or an 'insurrection motivated by national oppression or public grievances'. Blackstone not only classifies this conduct as a type of *treason*, but also as a type of 'usurpation of government powers and invasion of king's powers', in what might be called a new type of offenses that are 'against the constitution'. Indeed, when Blackstone classifies *high treason* as a type of *crime*, the main feature that distinguishes it from other crimes is that it is against the *supreme executive power* which refers to 'the king and his government'. In doing so he is establishing an offense against the constitution rather than against the person of the king, or the loyalty to the king.

3.5.4.3 Conspiracy

Blackstone uses very little the term *conspiracy* or its derived forms (only three times) as synonymous with *compassing*. The propositional forms he uses are *to conspire against* somebody, as in "to have conspired in public against his liege lord and sovereign,"[636] to conspire to do something, as in "to conspire to imprison the king by force,"[637] and "a bare conspiracy to levy war."[638]

[636] Ib., 75

[637] Ib., 79.

[638] Ib., 81.

4. The Rise of the Action on the Case

The rise of the action on the case in the nature of conspiracy, or malicious prosecution as it would be later called, is a central event in the development of the concept of modern conspiracy for reasons that would later become apparent. Methodologically speaking, most scholars separate both developments as if there were no connections between modern criminal conspiracy and action on the case, other than the fact that both are somehow related to the medieval conspiracy. This is due partly to a lack of understanding of the process by which the action on the case itself came into being.

There is a general agreement that the very first reported case where the action on the case was "becoming better known,"[639] was the case of *Fuller v Cook* (1584) 3 Leon 100, 74 ER 567, but that the action had been known for a while before that case.[640] There also is a view that in the earlier cases it was apparent that "the writ of conspiracy had provided inspiration for the action on the Case for malicious prosecution," though later its form slowly departed from that of the writ.[641] Furthermore, a relationship with the action for word or slander has also been suggested.[642] Indeed, as Baker puts it, in the period the action of malicious prosecution was born "there are no clear lines to draw between the three," meaning between the former and the action for words, and the writ of conspiracy.[643] Beyond these suggestions and hints, nothing else in the way of explanation is offered. Baker seems to think that the action of malicious prosecution derived from the action from slander, and that, nevertheless, it bore some connection with the writ. By contrast, both Winfield and Kiralfy derive the action from the writ of conspiracy, though they point out that there was also some connection to slander in the early cases. The question remains as to whether the action of malicious prosecution derived from either of them, and if so, how.

---

[639] Winfield, *Conspiracy*, 120-1.

[640] Winfield, *Conspiracy*, 119-121; A. K. Kiralfy, *The Action on the Case* (London: Sweet & Maxwell, Ltd., 1951), 124-129.

[641] Kiralfy, *Action*, 127. See also Winfield, *Conspiracy*, 124.

[642] Winfield, *Conspiracy*, 124, 126; Kiralfy, *Conspiracy*, 126-7, 129; Baker, J. H., ed., *The Reports of Sir John Spelman*, vol. 2, (London: Selden Society, 1978), 236-7; J. H. Baker, *An Introduction to English Legal History*, 4th (London: Butterworths, 2002 [1974]), 445.

[643] Baker, *Spelman*, 236.

What follows is an attempt to explain the rise of the action of malicious prosecution both in terms of the action for words, and the writ of malicious prosecution. As it happens to be, the solution to the problem lies in an understanding of the way new concepts are created by the process of conceptual blending, and how meaning is constructed dynamically in discourse. Only in this way do we come to realize that after the emergence of the action for words, lawyers began to draw analogies between the new action and the well-known writ of conspiracy, probably due to practical reasons. Out of that mapping between action for words and writ of conspiracy, a blended space with elements from both frames emerged. Indeed, we can identify this new space as the form of the writ of conspiracy understood in terms of the action for words. At the very beginning, this blended form licensed the construction of alternative interpretations anchored to the input spaces, that is, lawyers, in their arguments, placed themselves in either the action for words or the writ space. But as such arguments were made, and because of them, the distinction was gradually made between the blended space and the input spaces so that the boundaries of a new concept or frame began to emerge. The consequence of this process, as will be seen, is that the whole domain of conspiracy was rearranged.

To describe this process, I should first briefly talk about how the action for words emerged as a response to ecclesiastical defamation. I will then show how the action for words and the writ of conspiracy began to blend.

4.1 A Litigious Society

As we will later see in this chapter, the concept of modern conspiracy was a consequence of the rearrangement of the law of defamation, which in turn resulted from the transformations that its structure underwent due to jurisdictional changes. But before we engage with the law of defamation, at least regarding that form of defamation which consisted in imputing someone a criminal behavior, we should take notice of the wider cultural and social framework within which the law of defamation was conceptually embedded. In other words, we should refer to the concepts and social patterns (sometimes conceptualized as unitary experiences, sometimes not) that the law of defamation frequently presupposes but does not render explicit. I am referring here to the concept of honor, and to the problem of an increasingly litigious society that frequently entrenched its disputes by bringing them to

court instead of restoring harmony by settling them out of court. Thus, as we will see, the law of defamation was an alternative to the culture of honor, and also a hamper or a brake on unnecessary prosecution.

Maybe because of the noticeable surge in litigation that manifested itself during this period, Early Modern lawyers had the perception that there was a parallel and unprecedented increase in legal abuses, and particularly a perversion of criminal justice. Hudson bemoaned that the Star Chamber was troubled with "many vexatious suits… and many frivolous bills put in" and that "this great offense of conspiracy, rarely heard of in former times, but in our age grown frequent and familiar."[644]

Regarding criminal justice, this was facilitated by the existing accusatory system that was set in motion with private prosecutions, frequently the alleged victims of crime. It is true that for real victims of crime prosecution was many a time burdensome and probably an undesirable course compared to some sort of settlement with the offender. However, abusers had the possibility of imprisoning, vexing and damaging the reputations of their enemies.[645] And there was no lack of reasons for using this tool. Simple revenge was the most obvious motivation,[646] but it was not the only one. Resorting to the threat of prosecution had become part of the strategy adopted by the parties to business disputes.[647] This is the motivation that moved a group of creditors to encourage false charges against Stone in the landmark *Poulterers' Case* (1611) 9 Co Rep 55b, 73 ER 813. Likewise, another of the *cause celebre* of false accusation at the time had originated in an unsuccessful attempt to claim rights in the

[644] Hudson TSC, 30, 104. Coke expressed similar complaints about the rise of unnecessary, frivolous, and vexatious lawsuits, 2 Inst 28.

[645] Witness to that is how prosecution for defamation had increased in the London Consistory Courts between the late sixteenth and early seventeenth century, and among the people prosecuted we find the instigators of malicious prosecutions; Robert B. Shoemaker, "The Decline of Public Insult in London 1660-1800," *Past and Present* 169 (2000): 99, 105.

[646] 3 SCHC 1-4, 3 SCHC 20-28, 3 SCHC 28-34, 3 SCHC 44-53.

[647] On the strategy of resorting to prosecution to strengthen one's position in economic disputes see Shoemaker, *Decline*, 112.

land.[648] Furthermore, in disputes over land, the possibility of escheat to the landlord after conviction of felony was always hovering in cases of conspiracy.[649]

4.2 The Law of Defamation

In the Roman Law tradition, *infamia* was the bad reputation arising from wrongful behavior and disqualifying from holding public duties.[650] The importance of such ill reputation lies in that when it was well spread it was a cause for suspicion, and therefore a good reason to put a man to answer a charge, and for this to undergo legal proceedings in order to clear himself.[651]It was natural for the law to take notice of the danger that such ill intended people may have on innocents by spreading false rumors against them. It was the ecclesiastical jurisdiction that first conceptualized the problem with a constitution enacted by the Council of Oxford (1222), which went by the name of *Auctoritate dei patris*:

> By the authority of Almighty God, We excommunicate all those who, for the sake of hatred, profit, or favour, or for whatsoever other cause, maliciously impute a crime to any other person who is not of ill fame among good and substantial persons, by reason of which purgation at the least is awarded against him, or he is harmed in some other manner.[652]

The law of defamation in England developed from this statute in the form of the interpretation of the courts and by the doctrine of the jurists. For instance, the constitution said nothing of the proceedings, and consequently, both *ex officio* prosecution and private actions were allowed in ecclesiastical courts. The scope of defamation was limited to imputations of crime, thus excluding mere insults and imputations of professional incompetence.[653] However, there were hard cases that fell between the line that separated the

---

[648] *Sir Anthony Ashley Case* (1611), 12 Co Rep 90-91; 77 ER 1366-1367.

[649] *Tayler v Tolwyn & al.* (1628) 3 SCHC 15.

[650] Plucknett, *Concise*, 571.

[651] Ib., 484. See also S. F. C. Milson, *Historical Foundations of the Common Law*, 2nd (London: Butterworths, 1981 [1969]) , 380.

[652] Helmholz, *Canon Law*, 572. Translation by Helmholz. See also Milsom, *Foundations*, 380. "Excommunicamus omnes illos qui gracia odii, lucrii, vel favoris, vel alia quacunque de causa maliciose crimen imponunt alicui, cum infamatus non sit apud bonos et graves, ut sic saltem ei purgatio indicatur vel alio modo gravetur," R. H. Helmholz, *Select Cases on Defamation to 1600* (London: Selden Society, 1985), xiv.

[653] Helmholz, *Canon Law*, 574-5.

imputation of a crime from mere insult.[654] The crimes imputed could be both ecclesiastical offences and felonies.[655] There was no distinction, and/or requirements, between general and specific imputations, nor between imputations in the course of legal proceedings and imputations *in the country*. As to the words constituting the insult, there was no clear rule as to whether they should be strictly constructed or not, and the general rule was that they should be interpreted in their most natural sense. [656] As to the subjective elements, there had to be malice (understood as an intent to cause harm) on the part of the person uttering the words, but malice was implied from them and consequently, the burden of proof lay on the defendant who would have to allege and prove lack of malice. Among the defenses that would defeat implied malice there was qualified privilege, that is, privileged situations where actionable words were allowed as when the words had been uttered in the course of criminal judicial proceedings, because it was a matter of public interest.[657] The issue of whether the truth of the imputation or justification was a good defense was subject to judicial discretion, and in those cases in which it was allowed it seems that it was rather a reason to mitigate the punishment than a defense.[658] Finally, *Auctoritate dei patris* required that some form of harm had been caused, namely to the plaintiff's reputation, but there was no requirement of allegation of specific damage as physical harm or monetary loss as a consequence of the defamation, though plaintiffs frequently added details about how they have suffered further damage as a consequence of the false imputation.[659]

For the victim, the immediate effect of a successful action of defamation was clearing up the victim's guilt, and therefore restoring her good reputation. As for the perpetrator, the constitution provided that they were to be punished with excommunication though it could be lifted by penance.[660] The typical penance involved ceremonies in public places in which the defendant admitted to wrongdoing, apologized, and asked for forgiveness. This

[654] Ib., 577-8.

[655] Ib., 575. See also Milsom, *Foundations*, 380.

[656] Helmholz, *Canon Law*, 576-7.

[657] Ib., 579-80.

[658] Ib., 582-3.

[659] Ib., 586-7.

[660] Ib., 586-7. See also Baker, *Introduction*, 436.

ceremonial was clearly designed to restore the peace between the parties[661] Furthermore, since the defendant admitted to wrongdoing, this also emphasized the falsity of the imputation or, in other words, the innocence of the victim.

The boundaries of both common law and ecclesiastical jurisdictions with regard to defamation began to be defined early on by statutory law, which first limited the range of penalties that could be imposed with *Circumspecte agatis* (1285),[662] then, by 1 Edw 3 c 11 (1327). actions of defamation before ecclesiastical courts against indictors in the sheriff's tourn were forbidden.[663] As suggested earlier, since *Auctoritatis* did not specify the temporal or spiritual nature of the imputation, there was potential for a clash between the two jurisdictions. The principle setting up the jurisdictional boundaries took shape when the King's Bench began to prohibit defamation suits for imputations of temporal felonies.[664]

4.3 Action for Words

We will see how the development of slander in the common law tradition gave place to an action in which the insult was not the cause of action, but rather the pecuniary damages as a consequence of it.[665]

There is evidence that between the thirteenth and fourteenth centuries, local courts entertained actions for words.[666] In these cases, the plaintiffs complained of insults, which many times were general imputations of criminal character or conduct that entailed rather than alleged the commission of specific triable crimes, such as calling someone "a thief, a seducer and a manslayer."[667] In addition to the insult, these actions did not only allege harm to the plaintiff's reputation, but also consequential temporal damages caused by the insult,[668]

---

[661] Helmholz, *Canon Law*, 588.

[662] Plucknett, *Concise*, 485; C. H. S. Fifoot, *History and Sources of the Common Law. Tort and Contract* (London: Stevens & Sons Limited, 1949), 126; Milson, *Foundations*, 380.

[663] Fifoot, *History and Sources*, 126; Baker, *Introduction*, 438.

[664] Plucknett, *Concise*, 492; Baker, *Introduction*, 438; Milson, *Foundations*, 380; Fifoot, *History and Sources*, 126.

[665] *Plucknett, Concise*, 493.

[666] Baker, *Introduction*, 436; Fifoot, *History and Sources*, 126; Milson, *Foundations*, 379.

[667] *Swindon v Staler* (1294) Fifoot, *History and Sources* 138; see also *Graylling v Dike* (1288) Fifoot, *History and Sources* 137-138, and *Woodfool v Pors* (1293), Fifoot, *History and Sources* 138-9.

[668] Plucknett, *Concise*, 484-5; Fifoot, *History and Sources*, 126.

such as a reduction of the term of a lease,[669] the abortion of a delivery of goods,[670] or the loss of a loan.[671]

During the medieval period, the notion of defamation also made its appearance in common law courts, though there was never an action comparable to that of the ecclesiastical jurisdiction. The concept was frequently hidden within other forms. In the criminal jurisdiction there was for sure the remedy provided by the statute Scandalum Magnatum 1378 against the slanderers of public officers.[672] Some cases involving defamation were brought before the Star Chamber as well, but it seems that the grounds of the jurisdiction laid on the public consequences of certain slanders rather than on the harm to reputation or the consequential damages for the plaintiffs.[673] There were also some examples of actions for imputing misconduct in the course of legal proceedings. or for slandering in open court during the thirteenth and fourteenth centuries, but these seemed exceptions rather than giving rise to an action for defamation in royal courts.[674]

Finally, during the fourteenth and fifteenth century, actions involving a claim of villainage as a consequence of which the plaintiffs had lost business were brought before common law courts. But the merits of the case were buried under the form of a "trespass for lying in wait and threatening to seize a man as a villain,"[675] where the alleged cause of action was not the actual words but the violent assault that led the plaintiff to discontinue his business.[676] These hidden grounds emerged to the surface at the beginning of the sixteenth century, when the action for words finally came into being in the common law courts as will be seen next.[677]

---

[669] *Swindon v Staler* (1294) Fifoot, *History and Sources* 138.

[670] *Woodfool v Pors* (1295) Fifoot, *History and Sources* 138-9.

[671] Mor's Case (1333) Fifoot, *History and Sources* 139.

[672] Milson, *Foundations*, 379; 8 HEL 333.

[673] Baker, *Introduction*, 436.

[674] Baker, *Spelman*, 236, Baker, *Introduction*, 437; Plucknett, *Concise*, 491.

[675] Baker, *Introduction*, 437.

[676]Baker, *Introduction*, 437; Milson, *Foundations*, 381; Fifoot, *History and Sources*, 128; Plucknett, *Concise* 491-2; Baker, *Spelman*, 236-7.

[677] Baker, *Spelman*, 238.

Finally, defamation made its way to the common law courts as an action for words during the first third of the early sixteenth century.[678] The new jurisdiction was carved out of the ecclesiastical one. As we will see, the parallelism between the new action for words and ecclesiastical defamation was manifest to contemporaries, but the new action owed as much to the old local action for words as to the forays of the Middle Ages. This is to say that though the action for words was based on the notion of defamation, it construed it in a slightly different way

The foundations of this jurisdiction rested on the distinction between temporal and spiritual matters in cases of defamation, and the distinction between temporal and spiritual causes of action and remedies. As said earlier, the Oxford constitution did not draw any distinction between imputations of ecclesiastical and secular crimes, nor between imputations out and in court. Thus, since the question of truth was sometimes raised in ecclesiastical courts, the door was opened to these courts to determine issues pending on common law courts and thus interfering with their exclusive jurisdiction over criminal matters. Eventually, this led to the issuing of writs of prohibition. Then, by the end of the fifteenth century, defendants in defamation for imputations of crimes began to bring actions against their plaintiffs under the Statute of Praemunire because they interpreted that they violated the principle that the determination of the Pleas of the Crown was a competence of the King's Bench. By the beginning of the 16th century, the ecclesiastical jurisdiction over imputation of felonies had been brought to a halt.[679] Apparently, this implied that there was no remedy available for words imputing temporal offences.[680] In developing a remedy, the common law courts laid down the jurisdictional principle that separated the common law from the ecclesiastical defamation, and which set up the foundations for further forays of the former into the latter.

As suggested earlier, temporal damage or loss as a consequence of the words became the essence of the common law action for words. It was not an action for the words themselves but for their consequences. This allegation emphasized the temporal nature of

[678] The first action goes back to 1508, and the first decision recorded was in 1517; Baker, *Spelman*, 238.

[679] Helmholz, *Canon Law*, 593-6. See also Milson, *Foundations*, 380; Baker, *Introduction*, 438; 8 HEL 380.

[680] Baker, *Introduction*, 438; Baker, *Spelman*, 236. See also 8 HEL 333.

offense, justifying the intervention in an area traditionally linked to the ecclesiastical jurisdiction, and at the same time showed what the grounds of the special case was. In these early cases where the words amounted to an imputation of felony, the special damages alleged included the risk to life and liberty, and arrest and imprisonment. In other cases, there were allegations of economic loss usually as a consequence of the damaged reputation so vital to economic deals.[681]

The rule soon became that special damage was not traversable and that the issue revolved around the speaking of the words. This entailed that there was no need of proof of special damage which could be presumed from the uttering of the words. This would later lead to a fourfold classification of the words of which damage could be presumed: imputation of offences, attribution of communicable diseases, unfitness for profession, and misconduct in an office of profit. In the rest of cases of actions for words, proof of special damage had to be made in addition to the utterance of the words.[682]

Temporal loss not only served to distinguish the ecclesiastical jurisdiction over defamation from the common law jurisdiction over the action for words, it also became the basis of the assault of the latter over the former. The issue of whether it was possible for common law courts to try action for words amounting to ecclesiastical offences had been raised in early cases such *Anonymous* (1536) Fifoot, *History and Sources* 141-2, where Fitzherbert and Shelley JJ laid that the only imputations for which common law courts had cognizance were treason and felony. However, soon it became established that temporal loss as a consequence of imputations of spiritual offenses was triable at common law courts.[683] For instance, it was said that an imputation of bastardy was actionable at common law because "for this case the ground of the action is temporal, sc. that she was to be advanced in marriage and that she was defeated of it, and the means by which she was defeated was

[681] Baker, *Spelman*, 238, 243. Both are combined, for instance, in an Anonymous case in (1536) Fifoot, *History and Sources* 141, the plaintiff claimed to have been "kept in the Gaol… among the prisoners there lying… and by reason of the said words thus proclaimed and published… has not only been harmed and prejudiced and has suffered despite in his good name, fame and condition, but also by reason of such aforesaid false imputation of crime, has been greatly injured and damnified by much labour and expenses." This case, thus, averred harm to reputation, to the person, and economic loss or vexation.

[682] Baker, *Introduction*, 446; Baker, *Spelman*, 240, 245; Milson, *Foundations*, 385; 3 HEL 347-351.

[683] Plucknett, *Concise*, 440; Baker, *Introduction*, 439-40; Milson, *Foundations*, 383, 5; Helmholz, *Canon Law*, 573, Baker, *Spelman*, 238-41; 3 HEL 350-351.

the same slander, which means tending to such end shall be tried by the common law."[684] This problem of the separation of ecclesiastical and temporal jurisdictions would be approached from a different take as the common law courts received the doctrines about conspiracy developed by the Star Chamber. But we will see that later.

The first actions for defamation (not under other frames) made their appearance in common law courts between 1508 and 1537. The declarations in these actions show that they arose out of the blending of the concept of ecclesiastical defamation and the nascent common law actions for damages or actions on the case. Thus, in keeping with the former, plaintiffs alleged the imputation of a temporal offence (mainly theft), and prior good reputation. The words constituting the defamation had to impute an offence.[685] This element was again present in the ecclesiastical concept of defamation. However, as we have seen, the ecclesiastical defamation was limited to imputations of spiritual offences. Therefore, it was natural to think that the new common law action was limited to imputations of temporal offences. Indeed, it could be said that the new action filled the gap in the law created by the prohibitions and the application of the Statute of Praemunire.[686] Furthermore, this brought forward the idea that the distinction between the ecclesiastical and the civil jurisdiction lay in the nature (spiritual or temporal) of the offence. Yet, as we will see, defamation was never seen as a unified category. Or to put it in other words, the distinction remained external, that is, a separation of jurisdictions, but did not become internal to the category of defamation.

Most of the early imputations were of theft,[687] though there were cases of other offences, and of imputations that did not amount to a felony nor even an offence, such as claims of villeinage and extortion.[688] Like ecclesiastical defamation, the action for words was indifferent to whether the imputation had been uttered in legal proceedings or not, but many of these early actions alleged some form of prosecution. For instance, in the *Anonymous Case* (1536) Fifoot, *History and Sources* 141, the declaration averted that the defendant had

[684] *David v Gardiner* (1593) Fifoot, *History and Sources* 144.

[685] Baker, *Spelman*, 238.

[686] Fifoot, *History and Sources*, 129, Plucknett, *Concise*, 493.

[687] Baker, *Spelman*, 243.

[688] Baker, *Spelman*, 238, Milson, *Foundations*, 381.

"caused to be written a certain Bill of Indictment of and concerning [the plaintiff] … and the same Bill to be presented before the faithful and beloved Justices of our Lord the King". And in *Buckley v Wood* (1591) Fifoot, *History and Sources* 143-4, the defamation seemed to have taken place when someone repeated the words of a bill in the Star Chamber as true. This is consistent with the rule regarding the nature of the imputation of offence, that it should be specific rather than general.[689] That is, there should be imputation of a crime committed, rather than merely implied by a character attribution (such as calling someone thief, slayer, etc.).[690] Finally, these words should be published, that is, the imputation should be public.[691]

In the early actions, it seems that malice was alleged but, as with ecclesiastical defamation, was not traversed but rather inferred from the words and possibly other circumstances. This resembles the idea of what would be known as implied malice or malice in law.[692] However, there were instances of allegations of what would be known as express malice or ill-will that appear in early declarations, such as detailing that the plaintiff acted upon "scheming to harm his name and estate."[693] As we will see later, this malice only became relevant as a replication to the defense of privilege.[694]

Though it has been pointed out that plaintiffs found this action for word more attractive because of the damages assigned by it, in contrast to the ecclesiastical jurisdiction, the civil action was also intended to restore the reputation of the slandered person. That means that the action was supposed to clear them from suspicion, proving their innocence. In other words, part of the process of defamation implied that the imputation was false (though maybe we cannot say that it was procedurally false). This line of thought is clear in

---

[689] Baker, *Spelman*, 242.

[690] Underlying this is the distinction between insult and imputation of actions which reflects, for instance, on the rule laid in *Brittrige's Case* (1602) Fifoot, *History and Sources* 145, that "adjective words will maintain an action and sometimes not. They are actionable, (1) when the adjective presumes an act committed, (2) when they scandalize one in his office or function or trade, by which he gets his living… but when the words do not imply an act done, but an inclination to an act which doth not scandalize the party in the duty of any office or function not in his trade of living, there an action upon the case doth not lie"

[691] Baker, *Spelman*, 238, 243.

[692] Baker, *Introduction*, 441; Baker, *Spelman*, 236; 3 HEL 372.

[693] Baker, *Spelman*, 238, 243

[694] Baker, *Introduction*, 441; Baker, *Spelman*, 246; for instance, in *Bele v Mersshe* (1529) Baker, *Spelman* 247, n (1) the plaintiff replied to a plea of privilege that he had spoken the word "de suis propiis precogitatis malicia odio mundia et injuria et absque causis."

Buckley v Wood (1591), in which the accusation had been held to be insufficient. Yet the court said that the action laid because "if such matters may be inserted in bills exhibited in so high an honourable a Court in great slander of the parties, and they cannot answer it to clear themselves, not have their actions as well to clear themselves of the crimes as to recover damages… great inconveniences will ensue."[695]

4.4 The Blending of Writ of Conspiracy and Action for Words

When it comes to explaining why the action that later would be called malicious prosecution arose in the common law courts, most legal historians opt for a functional explanation. The writ of conspiracy had become fixed in the form of a procurement of false indictment by conspiracy. This resulted in two main constraints for using this action to remedy similar situations. The first was the plurality requirement, that is, the idea that the writ was limited to collective forms of legal abuse. This, obviously, excluded single-man prosecutions. The second was that the action did not lie if the innocence of the defendant was not proven, that is, the principal cause had to have concluded with the acquittal of the party indicted. This meant that those failed prosecutions that had not been able to secure an indictment did not give rise to actions by the writ of prosecution. Thus, Winfield points out that the writ of conspiracy was already in decline when the new action on the case emerged,[696] and Baker suggests that the action of defamation from which malicious prosecution would emerge was immediately perceived as an alternative way "made to do similar work to the old action of conspiracy, with the important difference that they could be brought against a single prosecutor and without proof of acquittal."[697]

These two explanations dovetail with two different ways of understanding the genealogy of malicious prosecution, either as an action on the case that outgrew the medieval writ, or as a particular form of defamation that developed from the practice of alleging malice in advance of the defense of privilege. In fact, if we think of the early cases of malicious prosecution as motivated by prudence and caution on the part of lawyers, it can be said that

[695] Fifoot, *History and Sources*, 143-144.

[696] Winfield, *Conspiracy*, 141-2

[697] Baker, *Spelman*, 246. Cf.

the structure of malicious prosecution probably owed to both parents as a blend motivated by an analogy between the writ of conspiracy and the nascent action for words.

One of the very first questions that lawyers might have struggled with when the action for words was being developed was whether it could be brought for imputations of offenses in court. That is, whether when faced with the facts of an imputation in court, they could invoke the frame of the action for words or not. It was not given that these actions would succeed. It is true, as seen earlier, that the ecclesiastical defamation did not make a clear distinction between imputations out of court, and those made in the course of legal proceedings. And the action for words seemed to fill the gap created by the limitation of the ecclesiastical defamation to spiritual offences, leaving without remedy "the most serious untruths of all—those which put a man's life or liberty in jeopardy."[698] Yet, there was already a remedy for these untruths when they were so serious as to have been substantiated in an indictment: the writ of conspiracy. And the very reason that the ecclesiastical courts had been prevented from messing with the criminal process could have deterred these early pioneers from bringing actions for imputations in court. Indeed, the prohibition on ecclesiastical courts was not only due to a fear that they would make inroads into criminal jurisdiction, but also that they would interfere with the course of criminal proceedings.[699] Thus, common lawyers tempted to use this new action for words against prosecutors might have been concerned with the possibility that such actions might be challenged in court on the basis that there was already legal remedy for imputations in court by the writ of conspiracy or that there could be no actions for words against such imputations because they would discourage criminal prosecution.

But, as said earlier, one of the clear limitations of the writ of conspiracy is that it could not be brought against single prosecutors, or against failed prosecutors. For sure, this was equally an abuse of criminal process, but the law did not consider it serious enough to deserve either punishment or remedy. This was the field were the action for words seemed

[698] Baker, *Introduction,* 438.

[699] For instance, the statute 1 Edw 3 st 2 c 11 (1327) was intended to restrain litigants from bringing actions against presenting jurors in the sheriff's Tourn on the grounds that "many People of the Shire [would] be in fear to Indict such Offenders" if such actions were allowed (cf. Fifoot, *History and Sources*, 127; Baker, *Introduction*, 438; and Helmholz, *Canon Law,* 594.

to have more potential for redress. But the action for words was of a different nature. The focus of the frame of the action for words was not the abuse of criminal process by private prosecutors (with or without agreement as the factoring element), but the effect of certain words. For sure, if those words are uttered in a certain setting and according to ascertain form, we can think of their legal effect—the ensuing of legal proceedings—as the effect of those words (notwithstanding other sorts of effects). As we will see, this was part of the analogy that lawyers saw between writ and action for words. But the matter of fact was that false imputations of offences in Court could be considered either as abuses of criminal law or as words that have an effect on the reputation of a person. In this latter case, the fact that the words are uttered in a legal setting does not constitute an essential part of the wrong (it can take place in or out of court), but it might perhaps be considered as an aggravation. By contrast, the uttering of the words in a legal setting was an essential part of the abuse frame. After all, the same imputation made in a different context would not amount to an abuse.

By defect, such imputations would be considered from the point of view of abuses, and as such the common law only considered abusive collective criminal proceedings, and only once those proceedings had come to an end. Prudence recommended to stick to the old writ of conspiracy.

4.4.5 The Blended Frame

The solution was to think of defamation by imputation in court in terms of the old writ of conspiracy, but adding up the effect of the words on the reputation of the defendant. This was based on an analogy between the two frames of the writ and defamation: both included words imputing the crime. In both frames, one of the frame elements were words imputing a crime (though in the writ this element was never lexically realized). The main difference was in the different perspective they took about these words imputing a crime. The writ of conspiracy focused on their illocutionary force, that is, the fact that by uttering them in a certain setting—by complaining before a JP, by bringing an appeal, or by bringing a bill of indictment—and according to a certain form—swearing to its truth, etc.—these words initiated criminal legal proceedings causing a wrongful prosecution. The action for defamation focused on their perlocutionary force, that is, the conventional effect that these words had, independently of the setting in which they were pronounced, of damaging a

person's reputation. Because of this analogy, a blended space emerged which contained elements from both input spaces, but that also excluded decisive elements from both spaces (as we will see, this led to several objections in court). Thus, these actions alleged the imputation of offences in court, specifying both their illocutionary force, and their abusive nature (the intent was not genuine but pretended), but also their perlocutionary effect.

This new structure of was what we might call a defamatory writ of conspiracy. It was neither an action for words, nor properly the writ of conspiracy—though it was probably intended as a species of the latter. We will see how this blended space would later become the action upon the case of conspiracy, and then malicious prosecution. We will also see how it changed the view of the writ of conspiracy from an action against wrongful prosecution to an action for damages.

I will now show how this blended frame was realized in the allegations of the actions that most scholars consider already of malicious prosecution. These scholars normally distinguish between early experiments of the action for words and the action for malicious prosecution. In doing so, they put the cart before the horse. They ignore the fact that these subsequent actions were indeed a conceptual blend of writ of conspiracy and defamation. As such, they were still connected to both frames. This means that in framing the issue, lawyers could argue, and argued indeed, both that it was either an action of defamation or a writ of conspiracy. That is, they would evoke either of these frames to abate the action. It was during these arguments that the belief that this was a new type of action emerged. What follows is an account of this process and its consequences.

Indeed, I will seek to show how the presence of lexical elements and expressions that invoked the frames encoded in the writ of conspiracy and the action for words reveal this potential conceptual blend, at least in the way lawyers framed the factual situations presented by their clients. I will then provide further proof of this conceptual blend in the way lawyers evoked both the frames of the writ and those of the action for words to interpret the plaint and declarations so that they drew favorable conclusions. Lastly, I will show how all this process of frame shifting gave rise to the emergent structure of action on the case first, and malicious prosecution later.

4.4.5.1 Wrongful Prosecution

4.5.4.1.1 Control of Prosecutors

Prosecution is usually defined as the initiation and continuation of criminal legal proceedings against a defendant. The instigation occurs when someone brings a charge against someone, that is, when someone imputes an offence upon someone else, before some authority or in a legal setting. This imputation sets in motion the machinery of criminal justice that will secure that the accused party appears in court to answer to the charges, upon which they would be put to trial.

Through the course of the common law, there emerged different methods of finding out about suspected criminals and bringing them to court, with different legal consequences.[700] The oldest procedure was the appeal. It was made in a court of law and led to the request of the party accused to appear, under threat of outlawry. After they appeared, without more, they would be put to answer to the accusation and then submitted to combat trial. Though in theory the appellor acted for the king and claimed no damages, this mode of prosecution was more of a private action against someone. In that system, the prosecutor was frequently the victim or someone of his kin, and they normally initiated prosecution out of their own suspicion.

The development of the Eyre system added a new method of prosecution. Bodies of jurors were made to present, that is to inform of, suspected criminals before the Eyre with regard to a list of crimes they were inquired about by the justices.[701] The jurors themselves were supposed to arrest the suspects, though the court also provides for their secret arrest and imprisonment if the jurors could not.[702] Once presented, they were put to trial by ordeal—which after 1215 would be jury trial. This was a true system of public prosecution in that there was no interested party instigating criminal procedure, but rather a body of neighbors

[700] Although these methods were available for the prosecution both of misdemeanors and felonies, I will only focus on the methods of prosecution of felony and treason which had far more serious consequences and I will omit prosecution by information.

[701] J. G. Bellamy, *The Criminal Trial in Later Medieval England* (Toronto, Buffalo: University of Toronto Press, 1998), 19.

[702] Bellamy, *Criminal Trial*, 19.

bringing communal accusations[703] on the king's behalf. It is true, however, that many of the crimes the presenting jury apprised the justices of had been previously appealed in the county court, but the presentment was not the continuation of these actions. They were neither accusers nor witnesses, but rather reported about what was *fama publica* in the county.[704]

In addition to these methods of instigating prosecution, by the last part of the thirteenth century, a new method developed that would contribute, along with other circumstances, to the change of the presenting jury into the grand jury. When itinerant justices were in the county, private complaints could be brought before the court, which would pass them on to the presenting jury as part of their supply of information about the commission of crimes. However, over time, the presenting jury would endorse them with a *billa vera*, if they considered them true, and with *ignoramus* otherwise. Initially, this would have probably been out of their own knowledge. However, as they stopped being a self-informing jury, they came to rely on those bills for their indictments. Thus, at this point, it could be said that the instigation of prosecution was no longer a matter of the presenting jury, but rather of these private complainers who brought the bills upon which the indictment would be based.[705] This bill procedure reintroduced private prosecution into the system. Indeed, in keeping with the appeal procedure, only victims or their legal representatives, or the kinsman or servants it they were deceased, were supposed to bring bills of complaint. This implied that they would have a first-hand knowledge of the crime. However, as we will see in short, these bills did not put the party to answer. That was the duty of the presenting jury. In fact, the development of pre-trial investigations along with this jury would make these bills less risky than the old appeal.

It seems clear that before the eighteenth century there was no system of defendant's rights whose violation would defeat the criminal process. Rather, the only real safeguard was controlling the quality of the prosecution. And judicial control of prosecutors was linked to weighting policy considerations. The general goal might have been to improve the quality of

[703] Ib., 24.

[704] Frederick William Maitland, and Frederick Pollock, *The History of English Law Before the Time of Edward I*, vol. 2, (Cambridge: Cambridge University Press, 1898), 672-4.

[705] Bellamy, *Criminal Trial*, 22-24.

prosecution -an issue particularly important in a system of private accusations- that is, of securing that only well-grounded and successful prosecutions were brought forward. That would spare innocent people from being caught in the crushing judicial machinery, and would enhance trust and respect of royal justice. However, quality of prosecution might have seemed frivolous a consideration in times of lawlessness, and perceived or real insecurity, when too tight a control of prosecutors would inevitably have led to their discouragement, leaving crime unpunished. There was always this tension between preventing abusive or unnecessary prosecution and encouraging it. Thus, we might find two types of controls according to two types of goals: controls aimed at securing the prosecution of crimes, so that no crime went unpunished, and controls aimed at securing the quality of prosecution, so that only successful prosecution was instigated. And sometimes, the methods of control were a combination of both.

The control and screening of the imputation or accusation of offences on the part of the legal authorities to secure that the machinery of justice worked properly depended on the method of prosecution. Some of them allowed a pre-trial evaluation of the quality of the accusation since there were means to check the imputation, raising the question as to whether there was evidence supporting an imputation. Others waited till trial had proven the imputation to be false to exert the control of prosecutors, raising the question as to whether there was wrongdoing on the part of the prosecutor and providing remedies for it. Some dealt with public accusers who had been compelled to inform judicial authorities of crimes, whereas others were victims of crimes who, though they had an unenforceable duty to prosecute, always had a choice to step up and make a private accusation in the name of the king.

And this latter issue reveals one of the features of the medieval control of process agencies in general. Courts did not just quash insufficient imputations; they also presumed wrongdoing and punished it. We can see it when the Eyre justices amerce appellors and hundred for false appeals and false presentments. Likewise, there is no room for mistake or ignorance in reporting crimes. Failure to make a presentment in spite of good evidence was

visited with on the spot amercements for concealing offences.[706] This control by Eyre justices was exercised ex officio. They had the means to review the imputations since they had the records of local courts where appeals and inquests had been made.

These were pre-trial proceedings that prevented that innocents went to trial, or criminals from going unpunished. By the thirteenth century, defendants of appeals also had the opportunity to challenge their appellor's imputations because they had been made out of hatred and spite. This issue was first tried by an inquisition, and if it was true that there was suspicion of ill-will, the defendant was released and put to trial by jury. An acquittal carried the punishment of the appellor as well. Thus, the defendant obtained remedy against wrongful imprisonment and avoided the risk of battle.

But what are the concepts involved in these instruments of control of prosecutors? The notions of false appeals, false presentments and concealment as referred to mistakes and omissions in the reporting of offences were conceptualized as a neglect of their duty to prosecute crime for the king. These imply passive conducts, omissions. One fails to deliver something as promised. And the rule is, if you fail, you pay. The idea behind the writ of *odio et atia* is of a different kind. It does not imply a mere default or negligence in carrying out one's duty, but an active conduct; an abuse of law. And abuse here entails that the motive for which the prosecutor makes their imputation is ill, and that therefore their purpose is criminal. This writ is also a remedy against imprisonment, but the plaintiff does not allege any wrong, only the abusive imputation. Consequently, the writ provides a procedure to find the purpose of the appellor and then to review the imputation though trial by jury.

Finally, we get to the writ of conspiracy. As we have seen, the writ was originally designed as a catch-all sort of remedy aimed at tackling wholesale corruption of the civil and criminal process. During the fourteenth and fifteenth centuries, however, the courts limited its scope to the instigation of criminal proceedings, excluding jurors and officials acting under oath (at least in the civil action by writ). Consequently, the writ of conspiracy did not primarily focus on the imputation of an offence nor on the prosecutor, but on the involvement of third parties with the process along with trial agencies. That meant that the writ fell within

[706] F. W. Maitland, Pleas of the Crown for the County of Gloucester (London: Macmillan and Co., 1884), xxxiii; see also (Bellamy, Criminal Trial, 33)).

the post-trial remedies against wrongdoing rather than being a pre-trial review and control of the imputation made. Thus, it usually averred that these people acting together had caused him to be unjustly brought to justice and put to trial, for which they claimed damages.

This use of the writ of conspiracy to cure the misuse of criminal process, indeed, was more or less contemporary to the introduction of the bill procedure[707] and the end of the Eyre system, and thus reflects the complications of a new system of prosecution that was getting on its way. For one thing, it was not clear yet what the role of these private complainers was. Were they prosecutors? Were they informants? And the presenting jury: Were they prosecutors or a sort of reviewing body deciding on what prosecutions were well grounded and should go on to trial? In other words, either we consider private complainers as a source among many other ways for a jury to find out about crimes to prosecute, or we consider private complaints as the main way by which prosecutions can be started and the grand jury as a check on them before putting parties to prosecute.

It is safe to say that as long as the presenting jury was self-informing and did not depend exclusively on evidence presented to them by the prosecutors, relying on other sources for finding about crime, private complainers could not be seen but as a sort of informant. In other words, the indictment and trial could not be said to originate on their imputation but on the grand jury's. Furthermore, as long as presenting jurors are thought to have a duty to report crime, this runs contrary to any weighting of evidence and adjudicatory function. The presenting jury is there to report their suspicion of crime mainly based on public fama, if not on third party reports, and not to evaluate these private reports or that public fama.

According to the wording of the definition of conspirators, it seems that initially the writ of conspiracy did distinguish between those who "indict" and those who "cause to indict." As for the former, it is clear who they are and what they do: they institute the prosecution by formally imputing a crime. Those who "cause to indict" are probably those who one way or another influenced the indictors. This would in theory include not only officers and private individuals but also the representatives of the vill who reported on oath

[707] Bellamy, *Criminal Trial*, 35 points out the connection between writ of conspiracy and bill of indictment.

to the hundredors at the sheriff's tourn. The use of *cause to*, which does not suggest a screening jury, may be explained because of the duty indictors had to report crime once they knew about it.

The initial resolve to make presenting jurors liable was later withdrawn, and only those who caused the indictments were to be liable, that is, in the language of the writs, those who *procured* the indictment. But what does it mean to procure an indictment? For one thing, a procurement takes place when a procurer has a procured carry on some undertaking for the procurer. To put it in another words, someone gets someone else to do something which usually benefits the procurer or is in the procurer's interest though not necessarily. The core main frame elements are the procurer—the agent that makes the procurer to act—the procured—the person that carries about the undertaking for the procurer—and the undertaking—the task or activity that the procurer wants the procured to perform. Sometimes the means—that is, the action—by which the procurer gets to procure the procured are specified. Usually, these are speech acts, but they can be any other action as we will see.

Thus, the frame of procurement encodes triangulation in action or using third parties to accomplish the given goal. But as there are many ways of triangulating, the term *procure* has several senses, all of which derive by inheritance from the frame of procurement. Among these subframes of procurement, attention should be paid to the frames of abetting, packing a jury, and bringing about legal proceedings.

In the frame of abetting, the procurer makes the procured to commit a crime. Thus, the distinguishing feature is the nature of the undertaking, which is an unlawful act. The procurer is normally named as the accessory before the fact, and the procured as the principal. It should be noted that, within this frame, the procurer and the procured are supposed to collaborate or cooperate, and without that cooperation the abetting cannot take place. This collaboration can indeed be grounded on a social or economic relationship between procurer and procured that makes the whole procurement possible, as in the case of the employment relationship which is part of the employment scenario. The means by which the procurement takes place is frequently specified. Indeed, the term *abetting* suggests one of those means, but it can also be by means of directive speech acting like commanding.

When the unlawful act has to do with the corruption of juries and witnesses within the domain of the administration of justice, there are a couple of frames which inherit from the frame of abetting. If the means by which the procurer or abettor gets the procured to undertake an unlawful act is a monetary compensation or bribe, and the unlawful act has to do with committing perjury, we are talking of the frame of subornation.[708] If the procured is a law officer, such as a sheriff, and the unlawful act consists of impaneling specific people to the purpose of committing perjury, we are talking about the frame of packing a jury.[709]

There is one more frame inheriting from the frame of procurement that interests us: that of bringing about or causing to happen legal proceedings. This frame specializes from that of procurement in that the undertaking is these legal proceedings. In this frame, the procured and the means of procurement frame elements are not realized, nor is there collaboration or relationship between the procurer and the procured. The missing procured person is some legal authority empowered to issue processes of law like a court of law, and the means can be any speech act that instigates or prompts such authorities to act, such as a complaint. The construction that usually realizes this frame is that of 'agent procures undertaking to be made.' Sometimes, instead of bringing about legal proceedings, the event is framed as 'obtaining legal proceedings,' where a recipient obtains their issuance from some legal authority.

The *Termes de la Ley* gives us an instance of both uses at the same time: "the order in this case is, first to *procure* a Certiorari out of the Chancery, directed to the said Iustices, for the removing of the Indictment into the Kings Bench; and upon that to *procure* this writ to the Sheriff, to cause his Body to be brought at a day." In this passage, the first instance of *procuring* evokes the frame of obtaining in which the theme is the Certiorari and the source the Chancery. At first sight, the second instance seems to mean 'to bring or to carry,' but the sheriff here is the procured, and the bringing him out of prison is the undertaking.

[708] For instance, "[he who] shal unlawfully & corruptly *procure* any witnes or witnesses by letters, rewardes, promises, or by any other sinister & unlawful labour or meanes whatsoeuer, to commit any wylful & corrupt periury," Act for the punishment of such person as shall procure or commit any wylfull perjury 1563 (5 Eliz 1 c 9).

[709] So, Coke defines the *evil procurers* of the statute *Quia multi per malitia* as "such as use to packe juries by nomination, or other practice, or procurement," 2 Inst 561.

Now the existence of all these frames that inherit from the frame of procurement, makes the interpretation of the writ of conspiracy tricky, for the term *procure* can evoke any of them. The usual construction of the writ that the plaintiffs "procured the indictment, arrest, and imprisonment of the defendant" suggests that the frame evoked is that of bringing about legal proceedings, since neither the procured—the jury—nor the means of procurement are realized. The undertaking is the indictment and the subsequent arrest and imprisonment of the defendant until he was acquitted. That is, the undertaking is the wrong of wrongful prosecution. It is clear that the frame of procurement encodes the interference of third parties with the process of indictment, but the problem is that the means by which the procurement or interference takes place is not specified. It can be by direct corruption of the juries, that is, by subornation or by packing the jury. In this case, there would be cooperation between the jurors and their procurers. But it can also be by more subtle ways, as by misleading the jury into knowledge about suspected criminals, in which case there will not be collaboration between the jury, or at least a majority of it, and the procurers.

The use of the writ of conspiracy in criminal proceedings arose and became fixed at a time in which the system of the Eyre was reaching its end, and with it, the self-informing jury that had characterized it. Indicting jurors, it has been said, were supposed to know who was suspicious of having committed crimes already before coming to court (in fact, since they would later form the trial jury, they were supposed to know who was guilty of crime). That is to say, they were supposed to learn about suspects of crimes from the representatives of the townships who were sworn to report them.

Yet this use of the writ of conspiracy might be an indicator that things were beginning to change and information about suspects was beginning to flow into the presenting jury from different sources, and that authorities were growing anxious to control them. For one thing, it is certain that by the end of the thirteenth century, the bill procedure was an established practice both at the Eyre and the sessions. Furthermore, as the fourteenth century wore on, we are certain that presenting juries learned about the commission of crime from victims, informants, and officers (but the practice may be older, as the challenge of jurors suggests). It could be in informal ways: out of court, as when these agencies approached jurors before trials, as for instance in the case of a victim who reports to a friend in a jury, or maybe to a

court officer who would later tell the jury. It could be in court, by a formal complaint in a bill of indictment to be approved by the presenting jury, or by securing that they are impaneled by the sheriff. Thus, someone willing to bring a private accusation to a jury could choose either to do it directly by approaching the jury, by making someone to approach the jury with the information, by becoming jurors themselves, or formally, by a bill of indictment. Thus, the term *procure* could encode any of these different forms of bringing private accusations.

The writ of conspiracy as it developed in the fourteenth and fifteenth centuries presupposed, and was embedded within, the medieval presentment system of prosecution in which the means by which the prosecution started was the presentment of a dozen upon their knowledge of who was suspected of crime. The wrong it remedied was the arrest and imprisonment caused by the informal process by which juries learned about suspects of crime. In the end, this process necessarily came down to some private informal accusation. Indeed, in theory, the basis of the system, the public fama, can be boiled down to private informal accusations. It can be said that, in a way, the writ was rendering these private informal accusations accountable when they also involved the corruption of criminal process and collective action. In that sense, it can be considered a post-trial method of control of these private accusations.

By the sixteenth century, and more firmly since the enactment of the Marian committal statutes, a different system had developed that started prosecution with private complaints supported by JP's pre-trial investigation and screened by the Grand Jury. That is, the system allowed some pre-trial control of private accusations. In this system, private accusers cannot be said to be procurers, but rather prosecutors. That is, they resembled more the appellor, than the procurer of juries, that is, of indictments. But what should we make out of these imputations in court? Did they entail some wrongdoing?

Since private prosecutions involved the public utterance of the words imputing and offence, in theory, the new common-law action for words could remedy them as harming reputation or the purse. But this action did not make any distinction between imputations in or out of court, that is, between imputations that involved wrongful prosecution and those that did not. But if wrongful prosecution was considered, this was linked to the writ of conspiracy and the procurement of juries. In other words, that A prefers a bill of indictment

for felony against B before a jury can be framed either as an act of defamation—that the defamer utters words imputing an offence to a defamed person—or, and as an act of wrongful prosecution—that a procurer procures an innocent to be indicted (or procures the jury to indict an innocent); provided that there is indictment, of course, but I will discuss this later.

The new blended actions combine the point of view of the utterance of the words imputing and offence (in court) with that of wrongful prosecution as encoded in the writ. Early on, we find allegations of utterances in court such as a bill of information or a complaint made before local authorities combined with allegations of arrest, imprisonment, and indictment.[710] We also find both averments of imputations out and in court as shown by (1535) YB Pasch 27 Hen VIII, pl 27 fo 11a-11b, where it was alleged that the defendant "imputed to the same R. the crime of theft and larceny at B. in the aforesaid county, and expressly and publicly said, named and noted him to be a thief in these recited words, and other words to the same function and occupation, in the presence of the council and the hearing of many of the lieges of the said Lord King, and he repeated the same frequently." And at the same time it was alleged that afterwards he had "*caused a* certain bill of indictment to be written of and upon the aforementioned (praemissis), and showed (exhibuit) the same bill in the presence of the faithful (dilectic & fidelibus) of the Lord King… on the pretext of which the same R. then and the same appeared and was examined by the same Justice of the aforesaid felony, and the same R. then and the same declared himself to be not guilty of that felony in the presence of the same Justice, then and the same by many faithful and worthy witnesses."

By the end of the sixteenth century, the combination of both frames is manifest. The situations continue to be framed as a procurement of wrongful prosecution, but now the means by which the wrongful prosecution is procured—an imputation in court—are specified, since they are the grounds for the defamation as well. In *Fuller and Cook's Case*

[710] Baker, *Spelman*, 238, 243; Baker thinks that these were action for words in which the arrest and imprisonment as a consequence of the accusation of felony worked as a special damage, but this obscures the blended nature of these actions. Indeed, Baker, Introduction, points out the lack of "clear lines to draw" between writ, action for words, and malicious prosecution and the time and gives *Pare v Shakespere* (1511) (244, n (1) as an example in which "the defendant was alleged to have maliciously procured an indictment in order to blacken the plaintiff's name and disinherit him." Indeed, this allegation of a defamatory purpose contradicts the idea that the wrongful prosecution was the special damage of an action for words.

(1584), "the defendant had informed one… JP 'that the plaintiff had stollen the defendant's hogs… *by force of which*… [the JP] made a warrant, and directed it to the constable of H. to apprehend the plaintiff, and to bring him before [the JP]… *by force of which,* the plaintiff was arrested… and there was examined upon the said matter, and bound over by recognizance to appear at the next sessions, and there to answer."[711] So in the case of *Knight v German* (1587), where the defendant was reported as having caused "a bill of indictment of felony to be written, and the same being so written… *exhibited* the same to the grand jury… *whereupon* he was indicted of the same felony."[712] In *Smith v Cranshaw* (1623), the defendants "fauxment accuse luy devant un justice del peace del dit county, & q ils out un garrant del dit justice al constable de apprehender luy; *per q fuit* apprehend, & amesne devant le dit justice, & commit al prison del Norwich… un inditement fuit prefer al grand enquest."[713] In *Skinner v Gunton* (1670), the defendant was said to have "levied and affirmed… a certain plaint of a plea of trespass upon the case… [and] *by virtue of the said plain, caused and procured* to be arrested and imprisoned, and to be detained in prison for the space of twenty days and nights."[714]

Sometimes the relation is not instrumental but sequential. Thus, in *Hercot v Underhill* (1615) "[the defendant] brought him before the justices at Westbrummidge, et crimen feloniae, & burglarim, ei imposuit (ubi revera nulla felonia, nee burglaria facta fuit) & malitiose *procuravit* ipsum, to be arrested and imprisoned."[715] A more complex sequence of alternation between imputation and abuse appears in *Doggate v Lawry* (1608), where the defendant "*charged* him with felony, and there *caused* him to be brought before… a justice of peace, and *procured* him [the JP] to bind the plaintiff for his appearance at the general gaol-delivery in the county of Devon… [and] there *exhibited* a bill of indictment."[716] Likewise, in *Manning and his Wife vs Fitzherbert* (1633), imputation and abuse are sequential

[711] 3 Leon 100, 74 ER 567.

[712] Cro Eli 70, 78 ER 331.

[713] Latch 79, 82 ER 284; see also 2 Rolle 258, 81 ER 785; Palm 315, 81 ER 1100; W Jones 93, 93 ER 298; Benl 152, 73 ER 1019; Cro Car 15, 79 ER 618; Jones W 93, 83 ER 48.

[714] 1 Wms Saund 228, 85 ER 249; See also 2 Keble 473, 84 ER 297; 2 Keb 476, 84 ER 298; 2 Keb 497, 84 ER 312; 3 Keble 118, 84 ER 627; Raym T 176, 83 ER 93.

[715] 2 Bults 331, 80 ER 1163.

[716] Cro Jac 190, 79 ER 166.

rather than in a causal or instrumental relationship, thus the defendant "had caused her to be brought before Mr. Gregory, a justice of peace of the county of Oxon… ad tunc et ibidem, 'that he charged her with felony for stealing of an hog from one Hundby his cousin,' and required that she might be bound over to the Assizes, whereupon she was inforced to find sureties for her appearance at the Assizes."[717] In *Cutler v Dixon* (1585), the imputation is carried over with a wrongful purpose: "one *exhibits* articles to justices of peace against certain person, containing divers great abuses and misdemeanors… all this to the intent that he should be bound to his good behavior."[718]

Yet sometimes the declarations did not specify the imputation in court and simply put forward the procuring of wrongful prosecution as in the writ of conspiracy, as in *Throgmorton's Case* (1597), where the defendant "procured the plaintiff to be indicted as a common barrator before the justices of the peace."[719] In *Barnes v Constantine* (1605), the defendant "procured him to be indicted as a common barrator before J. S. and J. D. justices of the peace." [720] In *Pescod v Marcham* (1607), "[the defendant] caused him to be indicted for stealing of a plank."[721] In *Lovett v Faukner* (1618), "[the defendant] procuravit luy d'estre indicte sur l'estatute pur un recusant &c. per que il serroit fait un traitor."[722] In *Mills vs Mills* (1631), "the defendant procured him to be indicted."[723] In *Gardner v Jollye* (1649), the action was brought "for causing him to be endicted of felony as accessary, for suffering a prisoner to escape that was convicted of felony."[724] In *Atwood v Monger* (1653), the action was for "causing a false presentment to be made against him before the Conservators of the River of Thames."[725] In *Chamberlain v Prescott* (1659), the action was "for procuring the defendant to be arrested in another man's name," and declared that "the defendant caused him… to be

[717] Cro Car 271, 79 ER 836.

[718] 4 Co Rep 14b, 76 ER 886.

[719] Cro Eli 565, 78 ER 808.

[720] Cro Jac 2, 78 ER 25. See also Yelv 46, 80 ER 33.

[721] Noy 117, 74 ER 1081.

[722] 1 Rolle 109, 81 ER 364.

[723] Cro Car 8, 79 ER 809.

[724] Style 157, 82 ER 608.

[725] Style 378, 82 ER 793.

indicted."[726] In *Norris v Palmer* (1676), the defendant was sued "for causing [the plaintiff]… to be indicted for a common trespass in taking away one hundred bricks."[727] In *Pollard v Evans and Others* (1680) the defendants "did procure the plaintiff to be causelessly indicted of, &c."[728] The plaintiff in *Savile v Roberts* (1699) alleged that the defendant "indictari.. fecit et procuravit, ac indictamentum illud versus ipsum… prosecutus fuit et prosecutum esse causavit."[729] In *Goddard against Smith* (1704), the defendants were said to have "caused and procured… [the plaintiff] to be indicted."[730]. In *Jones v Gwynn* (1714), the declaration was that the defendant "caused him to be indicted for exercising the trade of a badger without license."[731]. In *Pedro v Barret* (1717), the indictment was for "procuring him to be indicted for conspiring to lay a bastard child to B."[732].

Other times the declaration alleges the imputation of an offence in court but does not go on to specify the wrongful prosecution, as in *Arundell v Tregono* (1608), where the defendant is said to "quandam billam indictamenti against the plaintiff scribi fecit, continen' that the plaintiff amongst others broke and enter'd the house of A. and stole half a bushel of wheat ; and exhibited it to the said justices ibid', who *caused it* to be openly read, and deliver'd to the grand jury."[733] In *Willins v Fletcher* (1612), the defendant "preferred a bill of indictment against Willins for being a common barretor"[734]. In *Payne v Porter* (1619), "[the defendant] imposed upon him crimen feloniae, supposing that he had robbed him; and … exhibited against him a bill of indictment, supposing that such a day and year he robbed him; and exhibited it to the grand jury in the county of Nottingham."[735] In *Wright v Black and Black* (1620), "[the plaintiff] preferred a bill of indictment, containing that the plantiff

[726] Raym T 136, 83 ER 73.

[727] 2 Mod 1, 86 ER 935.

[728] 2 Show KB 51, 89 ER 786.

[729] 1 Ld Raym 373, 375; 91 ER 1147, 1148; See also 3 Salked 16, 91 ER 664; 5 Mod 405, 87 ER 733; 5 Mod 394, 87 ER 725.

[730] 6 Mod 261, 87 ER 1007, 1008; See also 1 Salked 21, 91 ER 20.

[731] 10 Mod 699, 88 ER 699

[732] 1 Ld Raym 81, 91 ER 951.

[733] Yelv 116, 80 ER 79.

[734] 1 Bulstrode 185, 80 ER 873.

[735] Cro Car 490, 79 ER 418.

felloniously stole two bundles of vetches."[736] In *Johnson v Stancliff* (1641), the defendant "did prefer an indictment… and then he did prefer a second indictment."[737] In *Reynolds v Kennedy* (1748), the defendant was said to have "exhibited an information against the plaintiff before the Subcommissioners of Excise."[738]

The distinction between false imputation and wrongful prosecution or the wrongful instigation and continuation of criminal legal proceedings had to do with the stage which the criminal proceedings had reached. Imputation was relevant at the pre-trial proceedings; the prosecution as a whole did matter once trial had taken place. This can be seen in an anonymous case in 1635, where the action was for "causing [the plaintiff] … to be endicted for stealing of a mare," yet after it was found against the defendant, he moved in arrest of judgment that "upon preferring of the bill to the grand jury, they found ignoramus… so there is a repugnancy in the declaration, which sets forth that the plaintiff caused him to be indicted, and yet says that an ignoramus was found."[739]

That the system was seen as one of private prosecution, tempered by the Grand Jury, rather than as public presentments of known criminals is attested by the report case of *Andrew Henley v Dr. Burstal*. Thus, the case reports an action for "indicting the plaintiff,"[740] meaning the preferring of a bill of indictment, since it also reports "the indictment was found ignoramus."[741] That is, in the mind of the reporters, it seems that the imputation in court was equivalent to an indictment. Similarly, *Wine v Ware* (1661) is reported as action for "lo defendant… indict le plaintiff pur le embler' des barbits."[742]. *Smithson and Symson, Atkinson* (1674) reports an action for the defendant "indicting the plaintiff of perjury."[743] 3 Keble 837, 84 ER 104 reports the case of *Bringham v Brocas* (1678) for the defendant "indicting the

[736] Winch 28, 124 ER 24. See also Winch 54, 124 ER 46.

[737] Reports of the Pleas of Assizes of York 85.

[738] 1 Wils KB 232, 95 ER 591.

[739] Anonymous (1635) Style 372, 82 ER 788).

[740] Raym 180, 83 ER 95; See also 1 Vent 23, 86 ER 12.

[741] 2 Keb 494, 84 ER 310.

[742] 1 Sid 15, 82 ER 942.

[743] 3 Keble 141, 84 ER 461.

plaintiff for deceitful sale of hair." 2 Mod 306, 86 ER 1088 reports an anonymous case in 1679 in which the plaintiff "was indicted for a common trespass."

4.5.4.1.2 Collective Behavior

We have seen that the conduct typically described in these blended actions, the bringing of a bill of indictment before a court and the consequent prosecution, could be framed either as a defamation, if we focus on the imputation of an offence and the harm to reputation it effects, or as a wrongful prosecution if we focus on the fact that the imputation was in court, and gave rise to wrongful criminal legal proceedings. This conduct can be further framed as an individual or a collective behavior.

The old writ of conspiracy construed the wrongful prosecution as a collective action. This construal was usually encoded in the writ with the expression *by conspiracy between them before had* (or similar expressions). It should be noted that this expression does not encode the means but rather the way the action is carried over. This might be seen as a non-core frame element indicating the collective manner in which the main action is carried over. After all, one can imagine a prosecution without any kind of agreement. Or, put in other words, one alone can procure a prosecution. However, this became a central aspect of the wrong of wrongful prosecution during the Middle Ages, to the point that only the collective forms of prosecutions were considered wrongs remedied by the writ. This probably was due to the fact that wrongful prosecution was viewed as an essentially collaborative behavior involving the coordinated action of several people, particularly during the pre-trial process.[744] Thus, the law could break apart the different crimes involved in unlawful criminal proceedings (such as bribery, laboring of jurors, false testimony of witnesses, etc.) by assigning individual responsibilities, or it could lump all these conducts together in a single collective event: the conspiracy.

The collective behavior construal can be defined as follows. A behavior is performed by a number of agents as a group with shared or joint intention. This meaning can be construed using collective nouns making it the focus of attention, but it can also be construed with adverbs like *together* or adverbial expressions like *by agreement between them*, making

[744] See below *Sir Anthony Ashley's Case*.

the collective behavior the scope of attention. Thus, in the writ of conspiracy, the paramount expression *by conspiracy between them* codifies the wrongful prosecution as a collective behavior performed by the defendants as a group with a unity of purpose. In this way, the law lumped them together and made them equally liable for the wrong. However, it should be mentioned that because of the way in which it is constructed, there is no collective agency or entity performing the action but rather individuals acting together.

What we have here is a very particular frame that is different from that which we started with. The frame we may name as collective prosecution, which was the wrong that the writ remedied: to collectively instigate and continue criminal legal proceedings against someone. Thus, the frame elements of this frame were the collective agency, the instigators otherwise known as the conspirators or conspiracy, and the criminal legal proceedings instigated, the collective action.

One thing I should remind of is that the term *conspiracy* here does not encode any action, situation, or part of a scene, but rather encodes the scope of the given situation of prosecution. *Conspiracy* does not refer to any activity but to the nature of the action. It turns an individual action, that of prosecution, into a collective action or behavior, that is, an action performed or carried out by a group of people with a unity of purpose rather than by a single individual.

Now, we find this collective perspective in the conceptual blend resulting from the integration of the writ of conspiracy and the action for words, what I have called the defamatory writ of conspiracy. Thus, in *The Mayor of Boalton's Case* (1589), it was reported that the "defendants did conspire together to delay the plaintiff of his said suit, in peril of his debt."[745] In *Hercot v Underhill and Rochely* (1615), though the reporter summarizes the case as an action "for conspiring to indict… of felony," it follows from the arguments in court that the writ included the *by conspiracy* clause, since it alleged that "procuravit ipsum, to be arrested and imprisoned."[746] In *Pollard v Evans* (1680), "the defendants by combination and conspiracy, &c. did procure the plaintiff to be… indicted."[747] In *Skinner v Gunter* (1670), the

[745] 1 Leon 189, 74 ER 174, 175.

[746] 2 Bults 331, 80 ER 1163.

[747] 2 Show KB 51, 89 ER 786.

defendants "*per conspirationem* in the name of G. caused the plaintiff to be arrested in great actions, to which he could not find bail."[748] In this case we can safely substitute *together* for the expression calling up the frame of collective action without effecting a change in meaning: "the defendants *together* caused the plaintiff to be arrested in great actions…"

Yet the same collective situation could be framed as a planned behavior. The planned behavior is a complex frame made up of a sequence of sub-frames, of which the first one is deliberation—the desirability of realizing certain value or achieving a goal is evaluated. After positive evaluation, deliberation is followed by the imagining of a course of action for the realization of that goal; this is the plan. Then the agent decides to take this course of action and is ready to act upon it; this is the formed intent. Finally, the course of action that so far did only exist as a project is performed; this is the execution.

There are some cases revealing this new frame upon the whole issue of unlawful prosecutions which was a consequence of the development of this blended action. In *Smith v Cranshaw & Alios* (1626), "le defendants conspire & combine the luy accuser pur treason… & *sur ceo* ils cause le constable the luy arrester, & a portrer luy devant justices del' peace, & la ils. accuse luy de treason. *Et sur ceo* les justices luy committee al prison, & la il remaine tanque al prochain gaole-delivery, & adonque le dit defendant sur conspiracy & per mandate del' justices de gaole-delivery preferre un bill de indictment de treason versus luy."[749] *Mills v Mills* (1631) reports that the defendant along with others, "conspired to procure him to be indicted of such a felony… [and] such a day procured him to be indicted."[750] In *Goddard vs Smith* (1704), the defendants "*contriving and maliciously intending* [to defame]... and *having had a conspiracy between themselves*… to cause the said Richard Goddard to be indicted as a barretor and public disturber of the peace… *in prosecution and execution* of their *malicious*

[748] Raym T 176, 84 ER 312; Sir T. Raymond reports that "by a conspiracy between them there first thereof had… levied and affirmed in the name of the said William… a certain plaint of a plea of trespass upon the case… by virtue of the said plaint, caused and procured to be arrested and imprisoned, and to be detained in prison for the space of twenty days and nights." See also 3 Keble 118, 84 ER 627 and Raym T 176, 83 ER 93.

[749] Jones W 93, 83 ER 48. See also Latch 79, 82 ER 284; Palm 315, 81 ER 1100.

[750] Cro Car 8, 79 ER 809.

intention and conspiracy aforesaid… caused and procured the said Richard Goddard…to be indicted."[751]

In all these examples, *plan together* can be substituted for *conspiracy*. As to the sub-frames of the frame of planned behavior that are evoked, in the first two cases we find the plan evoked by *conspiracy*. As for the execution frame, it is evoked by *sur ceo/upon this* in the first case, whereas in the second one, it is the juxtaposition that signals it. The last example illustrates how differently frame elements are realized across frames. Thus, both the course of action (the wrongful prosecution) and the purpose or goal (defamation) are specified both for the planning stages as well as for the execution state. However, there is a lexical choice: *contriving* and *intending* to refer to plan with regard to its purpose without reference to the course of action, and *conspiracy* to refer to plan with regard to the course of action or means to achieve this purpose or goal.

Of course, as said earlier, the planned behavior in these cases is also a collective one. Thus, I should talk of plot or plan together rather than plan. What is the difference between the collective perspective here and in the frames encoded in the writ of conspiracy? For one thing, the focus of this frame is the fact that the wrongful prosecution has been planned and executed, not that it has been done collectively. Certainly, a plot is the basis of collective action and therefore if a wrongful prosecution has been plotted it means that it should be viewed as a collective behavior. However, in terms of what makes this conduct punishable, this aspect is not central compared to the fact it is planned behavior. In other words, by using this frame, the planned or premeditated and intentional aspects of the wrongful prosecution come forward while its collective nature remains in the background, maybe as an aggravating circumstance.

4.5.4.1.3 The Writ of Conspiracy Arguments

The connection between this blended defamatory writ of conspiracy and the input space of the writ of conspiracy becomes apparent in the way lawyers tried to abate it by drawing arguments that were typical of the arsenal of defenses that that form of action availed them with.

[751] 6 Mod 261, 87 ER 1007,1008.

ACQUITTAL REQUIREMENT

One of the central aspects of the writ of conspiracy as it developed in court was the requirement that the indictment had to be determined and lead to the acquittal of the defendant. In other words, the main cause had to be determined before the action for wrongful prosecution could proceed. This requirement made perfect sense in a system of prosecution by presentment where private parties laid no formal charges but rather informal accusations before the jury, which was bound to report them as public fama. Without any pre-trial investigation, the quality of these informal accusations could not be tested before trial, hence the acquittal requirement.

For sure, acquittal of the plaintiff after indictment was made part of the form declaration of several cases of this blended action,[752] following the form of the writ of conspiracy. As said earlier, this requirement made no sense within the system of prosecution that was crystalizing by the sixteenth century, but its inclusion within the form of this blended action was not a merely formalistic one. Thus, counsellors put themselves to work for their clients, reasoning as if the blended action were an action by the writ indeed.[753]

In *Shotbolt's Case* (1586) 1 Godbolt 76, 78 ER 47 it was argued that "the plaintiff did not shew in his declaration, that he was legitimo modo acquietatus." Clench J agreed that "if he were convicted, then there is no cause of action: and he hath not shewed whether he was convicted or acquitted… he ought to shew, that he was legitimo modo acquietatus." Wray CJ in *Knight v German* (1587) opined that "if two conspire maliciously to exhibit an indictment, and the party be acquitted, he shall have a conspiracy."[754] By contrast in *Barnes v Constantine* (1605) Yelv 46, 80 ER 33, the court laid that "this action… well lies, although

[752] 78 ER 331; 74 ER 99; 73 ER 785; 78 ER 808; 78 ER 25; 80 ER 33; 74 ER 1081; 80 ER 873; 124 ER 46; 86 ER 935; 86 ER 1088; 89 ER 948; 91 ER 1378; 87 ER 733; 87 ER 725; 87 ER 1007; 91 ER 951.

[753] Most historiography, indeed, believes that malicious prosecution derives from the writ of conspiracy of which it would have grown by suppressing the acquittal requirement and the plurality requirement. Yet Kiralfy, reasoning upon the consistency of the case law for that action, points out that "it cannot be said that the absence of an acquittal was made the basis of any clear distinction between Case and the old writ of Conspiracy."[753] The problem here is methodological: as we will later see, the very conceptual blend between defamation, writ, and abuse led contemporaries to believe that the new emergent structure was a new action derived from the writ of conspiracy formed by the suppression of these requirements. Yet this emergent structure did not sever its links to the input concepts until very late so that the issue of the acquittal requirement also continued to be raised until very late.

[754] Cro Eli 70, 78 ER 331.

the indictment is erroneous; or, as it has been adjudged, if a bill is offer'd, and ignoramus found." The same opinion was expressed in *Pescod v Marcham* (1607) Noy 117, 74 ER 1081 that the action "is good without saying, legitimo modo acquietatus, in an action upon the case, which lies as well before as after the acquittal." In *Arundell v Tregono* (1608) Yelv 116, 80 ER 79 the court conceded the point Yelverton had moved in arrest of judgment that "a man shall never be punished for bringing a false action… because non constat what was done on the indictment, whether the plaintiff was acquitted or arraigned upon it, or not: and if nothing was done upon the indictment, the plaintiff will clear himself too soon, viz. before the fact tried, which will be inconvenient." In an *obiter* in *Crankbancks Case* (1618) 2 Rolle 50, 81 ER 652, Doderidge J said that "home poet aver action sur le case sur faux conspiracy d'indicter home coment que il ne soit acquitted, mes conspiracy ne gist, si non que il soit indicted & acquitted."

In *Wright vs Black and Black* (1620), the issue turned around whether preferring a bill of indictment could give rise to the action, or whether there had to be an indictment too. In this case there is no direct reference to the acquittal requirement, but it is implied, since after indictment the action could not be brought, and of course, the accusation had to be proven to be false. Thus, the Defendant's counsellor moved in arrest the argument based on the writ form which averred the indictment of the party; namely that "the plaintiff had not averred in his declaration that the bill was found, but only that he preferred a bill of indictment against him containing such a thing; and this is not good… to say the defendants preferred a bill of indictment containing that the plantiff stole 2 bundles of vetches, this is only in nature of a recital, and no direct affirmation that there was such an indictment." He added that "the action it self [the writ] in this case will not lye, because the indictment was not found, but only an evidence [that he gave evidence], and [only] an acquittal [an ignoramus] before the grand jury."[755] The plaintiff's counsel denied the point and argued that "the action is maintainable, though it is not shewed that the bill of indictment was found." The court was divided as to whether the action lied, but for different reasons. Only Hobert CJ believed the declaration "to be good without any averment of an indictment indeed."[756]

[755] Winch 28, 124 ER 24. See also Winch 54, 124 ER 46.

[756] Winch 29, 124 ER 25.

In *Smith v Crashaw and others* (1626), it was argued by the defendant in arrest of judgment that "un action ne git, entantq, un ignoramus est trove, & poet estre trove culp; et pur c[eo] l'action ne git… quand un indict[e]m[en]t est p[re]ferre, & ignoramus trove, il poet estre nient obstant c[eo] culp: sur q, l'action sur le case ne git."[757] Doddrige J shared the opinion: "si le party fueront indicted, & trove men culp. tunc est le suborner punishable per cest action, mes nest issint in nostre case, car le indictee nest acquitt per verdict, mes le jury trove ignoramus issint [per] que il est subject still al auter indictment,"[758] and so did Houghton J : "unc[ore] luy se[m]ble, que action ne gist, quia est trove un ignoram[us] solem[en]t, q[ue] ne acquit le pl[ein]t[if] del treaso[n], mes est lyable a ceo, p[ur] q[ue] intant q[ue]n'est acquit de ceo, n'avera action."[759] The court resolved "que si un home ou plusors preferre un bill de indictment de felony falso & malitiose vers un auter home, & le jury done ignoramus sur le bill que en ceo case le partie poet aver action sur le case."[760].

In *John Vanderbergh and James Vanderbergh vs George Blacke* (1662), Hardres, arguing for the defendant, already thought that "it is a rule in law, to which all the books agree, that an action upon the case or an action of conspiracy lies for a false and malicious prosecution, upon which the plaintiff is acquitted or ignoramus found."[761] In *Skinner vs Gunton, Lyon, and Leason* (1670), it was raised in arrest of judgment that "it was no alleged by the plaintiff in his declaration that the plaint levied in the compter was determined either by nonsuit, or by discontinuance, or verdict against the plaintiff there…As in an action upon the case, or conspiracy, for falsely indicting one of felony, the plaintiff should shew that he was acquitted of the indictment before he can bring his action."[762] The plaintiff did not question the rule but went on to argue that in this case, "the complaint is only of an arrest, and not any other proceeding as joint, &c.,"[763], that is, that it was grounded on the false arrest only. The court did not go into the merits of the argument either and dismissed the exception

[757] Latch 79, 82 ER 284.

[758] 2 Rolle 258, 81 ER 785.

[759] Palm 315, 81 ER 1100.

[760] Jones W 93, 83 ER 48. See also Benl 152, 73 ER 1019.

[761] Hadre 194,196; 145 ER 447-8.

[762] 1 Wms Saund 228-9; 85 ER 249-50.

[763] Raym T 176, 83 ER 93.

on procedural grounds because "perhaps it might have been material upon a demurrer; but now the verdict has found the defendant guilty, namely, that he has levied a plaint…they did not regard whether it was determined or not; for if the defendant would have had advantage thereof, he ought to shew it, but he has passed it over by his plea of not guilty, and a verdict is found against him."[764] In *Pollard vs Evans and Others* (1680), the court laid that "in a writ of conspiracy, it must be alledged that the party was legitimo modo acquietatus inde, and shew that it was a fair acquittal. But this action will lie for such a malicious prosecution where [51] the jury find an ignoramus." (2 Show KB 51, 89 ER 786). Regarding indictments of trespass, Holt argued in *Savile v Roberts* (1699) that when the jury found an ignoramus no action laid for preferring a bill, but the action was good when the bill of indictment charged felony.[765]

In *Goddard v Smith* (1704), it was debated in a case reserved whether a *nolle prosequi* entered after indictment supported the declaration that the defendant had been indicted "for a false and malicious indictment of barretry, whereof he was legitimo modo acquietatus."[766] Holt CJ thought that "nolle prosequi was only putting the defendant sine die, and so far from discharging him from the offence, that it did not discharge any further prosecution upon that very indictment… he who gets off upon a nolle prosequi does not at all get off on the merits of the cause; and to maintain a conspiracy, it is necessary to lay and prove an acquittal." Powell J, though he was not certain as to the effect of the *nolle prosequi*, whether it discharged the defendant barring further prosecution or not agreed that the *nolle prosequi* did not make good the declaration and that "this action cannot be maintained but upon an acquittal, of the fact charged, by verdict, confession, &c."[767] In *Jones v Gwynn* (1714), upon demurrer, it was debated whether an action grounded on an insufficient indictment could be upheld without saying that the defendant "was acquitted by verdict" since "conspiracy lies not but for such an indictment upon which the defendant was so acquitted, as that he may plead his acquittal in bar of another indictment… [and] by a parity of reason it may be

[764] 1 Wms Saund 228, 229, 85 ER 249, 251.

[765] 1 Ld Raym 374, 379-81; 91 ER 1148, 1150-1. See also the report of the case at 5 Mod 394, 87 ER 725.

[766] 1 Salked 21, 91 ER 20.

[767] 6 Mod 261, 87 ER 1007, 1008.

inferred, that an action upon the case will not lie likewise, upon an indictment for a matter not indictable; and upon which, consequently, there could not be such an acquittal as could be pleaded in bar of another indictment."[768] Parker J argued that "conspiracy lies not without acquittal; and the reason of this, and the only one, is, because this is a formed action, and the form of the writ in the register is so… There is certainly no arguing from an action which is a formed one, for which there is a formal writ in the register, to an action upon the case, that is died down to no form at all. If an action upon the case be brought upon an indictment, where the jury find ignoramus, there is no possibility that there can be an acquittal."[769] However, in Lewis v Farrell (1718) "judgment was given for the defendant on demurrer, because it was not shewn how the indictment was determined."[770] But Parker's rule was affirmed in *Chambers v Robinson* (1726), where the issue of the insufficient indictment did arise again, and it was held that "the action would lie, though the indictment was bad."[771]

Plurality Requirement

The next line of arguments that lawyers derived from the writ of conspiracy was the plurality requirement. It was understood that since the writ was brought for a collective behavior, as encoded in the term *conspiracy*¸ it could not be brought against a single defendant only. In *Shotbolt's Case* (1586), Clench J laid that "there was no difference betwixt an action on the case, and a conspiracie, in such case, but onely this, that a conspiracy ought to be by two at the least; and an action upon the case may lie against one."[772] Likewise, in *Knight v German* (1587), Wray CJ laid that "and if two conspire maliciously to exhibit an indictment, and the party be acquitted, he shall have a conspiracy; so when one doth it, this action upon the case lieth."[773] In *Marsh v Vauhan and Veal* (1599), it was moved in arrest of judgment that the action "ought to be against two, and the one cannot conspire alone," and the court laid that "a writ of conspiracy lies not, nor is maintenable upon this verdict. But an

[768] 10 Mod 214, 216; 88 ER 699, 700.

[769] 10 Mod 214, 219; 88 ER 699, 701.

[770] 1 Stra 114, 93 ER 419.

[771] 1 Stra 691, 692, 93 ER 787.

[772] 1 Godbolt 76, 78 ER 47.

[773] Cro Eli 70, 71; 78 ER 331. See also Cro Eliz 134,78 ER 391; 1 Leon 107, 74 ER 99.

action upon the case, in nature of a conspiracy, might have been brought in this case."[774] In *Willins v Fletcher* (1612), the defendant pleaded "that this action doth not lye against him, for that he is only one person, and doth only take his oath upon the indictment; but a conspiracy is, where two, three, or more do conspire for to indict one; and the same lieth not against one." The court laid that "in this principal case here, an action upon the case, in the nature of a conspiracy, doth not lie."[775]. However, the grounds for their decision had nothing to do with the plurality requirement, but rather with the defense of privilege as we will see later.

In *Lovett v Faukner* (1614), the rule was taken for granted by the defendant's counselor, who argued that "lou un breif de conspiracie le giseroit si hont estre deux la cest action ne gisera lou est forsq; un."[776] In *Smith v Crashaw* (1622), it was laid by the court that "un brief de conspiracy ne gist vers un, car un ne poet solment conspire, car le brief de conspiracy ayant un precise forme ne poet estre extende ultra le forme, sed le action sur le case nest lye al ascun precise forme, mes est destre frame come le matter require ideo gist, coment que un solment fait."[777] In *Mills v Mills* (1631), it was moved in arrest of judgment that the "action lies not, because he did not sue the other as well as the defendant; for conspiracy ought to be against two." The court disagreed, "for an action upon the case may well be against one of them."[778] The same argument was raised with the same result in *Price v Cross and Others* (1657).[779] In *Skinner vs Gunton, Lyon, and Leason* (1670), it was moved in arrest of judgment "that here is an action of conspiracy which charges the defendants, that per conspirationem inter eos habitam, they caused a plaint to be levied, and the now-plaintiff to be arrested thereon, and all the defendants, except one, (namely, Gunton,) are acquitted, and therefore this action fails; for one defendant cannot conspire alone…and although the plaintiff might have an action upon the case against the three defendants, or one defendant only… yet here the plaintiff has chosen an action of conspiracy, which is found against him,

[774] Cro Eliz 701.

[775] 1 Bulstrode 185, 80 ER 873, 874.

[776] 1 Rolle 109, 81 ER 364.

[777] Jones W 93, 94; 83 ER 48, 49. See also 2 Rolle 258, 259; 81 ER 785, 786; Latch 79, 82 ER 284.

[778] Cro Car 8, 79 ER 809.

[779] Raym T 180, 85 ER 95.

because the defendant Gunton alone could not levy a plaint, and cause the plaintiff to be arrested per conspirationem, as this action supposes."[780] The court decided against the defendant that "it was an action on the case… and the substance of the action was the undue arresting of the plaintiff, and not the conspiracy. Wherefore the plaintiff had his judgment by rule of the Court." Morton J dissented because he believed that "it was an action of conspiracy, and that two of the defendants being acquitted, the plaintiff could not have judgment against the third."[781] In *Pollard v Evans and Others* (1680), it was moved that the action did not lie "for a conspiracy cannot be in or by one, but between two at the least" to which it was replied once again that "in a writ of conspiracy it is true (a), but in an action of the case it is otherwise; and though this be like the other, yet it is not the same."[782] The question seemed to be finally settled by Holt's opinion in *Savile v Roberts* (1699):

> where two cause a man to be indicted, if it be false and malicious, he shall have conspiracy; where one, he shall have case: so that the actions are founded upon one common foundation, but the number of the parties defendants determines it to the one or to the other… if such an action be sued against two defendants for procuring a man to be indicted of *a smaller offence*, though the word conspiraverunt be in the writ, yet if one of them be acquitted, the other may be found guilty. 11 Hen. 7, 25. Contra, of a proper action of conspiracy; for there if the one be acquitted, no judgment can be given against the other.[783]

Felony Requirement

Another area from which common lawyers drew arguments from the writ of conspiracy into the blended action was the form of the indictment. Indeed, the writ seemed to be limited to false indictments of felony. Thus, in *Lovet v Faulkner* (1613), the question arose as to whether the action on the case could be brought for an indictment of treason. Coke, sitting as CJ, believed he had:

> never yet did know in case of high treason, and for the prosecution thereof against one, any writ of conspiracy ever brought, there is no case in the law for this, but all the presidents are pro felonia; high treason concerns the person of the King; and there is no book in law, to warrant the bringing of such an action for a prosecution, pro

[780] 1 Wms Saund 228, 229; 85 ER 249, 250-251.

[781] 1 Wms Saund 228, 229; 85 ER 249, 251.

[782] 2 Show KB 51, 89 ER 786.

[783] 1 Ld Raym 374, 378-9; 91 ER 1148, 1150; cf. 3 Salked 16, 91 ER 664; 5 Mod 405, 407-8; 87 ER 733, 735; 5 Mod 394, 395; 87 ER 725-6.

> proditione… It had been a hard and a strange thing, if the powder traitors, for the prosecutions against them, might have had writs of conspiracy in case of high treason, there was never yet seen any writ of conspiracy, alte proditionis, such a president, neither I, nor yet any other ever as yet did see.[784]

Though the counsel for the plaintiff, George Crooke, objected that "ceo nest ascun treson fait al person del' Roy mes solment fait per statute pur recusancie," and that "nul action gist sur acquittal de treson pur ceo que treson tam altment touch le Crown,"[785] rather than the subject, the whole court concurred with Coke laying down that "no action upon the case, for conspiracy lyeth in case of prosecution against one for high treason, and we will not give way to a president, to make a new president in this case, and so the Court inclined to be all clear of opinion, that no action upon the case did lie, in this case."[786]

The issue was raised again a few years later in *Smith vs Crashaw, Sprat and Ward*, a case much argued between 1623 and 1626. The action was brought for a false and malicious indictment for uttering treasonable words to which two defendants had pleaded generally and one had denied conspiracy and malice. Among other issues, it was moved in arrest of judgment that the action on the case did not lie for indictments of high treason. The defendants argued that according to *Lovett v Faulker*,[787] there was no precedent of a writ of conspiracy for indictment of treason or as the Chief Justice put it, he was doubtful because "quo action sur le case ne gist in nature de conspiracy pur le indicter de auter de treason, quia conspiracy ne gist de ceo."[788] With regard to this, Doddridge J said "q[ue]il remember le case, mes il pense, q[ue]fuit arrest p[ur]fault in le declaration."[789] and that he remembered a precedent "de mon knowledge demesne q si home que force auter estre fauxment indicted pur treason, & confesse ceo que il est puniable per cest action, come fuit a ore in un case de Cambridge-shire, lou un conspire ove auter pur indicter J. S. de treason, que ils font apres l'un confesse que le auter ad suborne luy, & que ils font sur ceo malice, sur que il auxi

[784] 2 Bulst 270-1; 80 ER 1114-5.

[785] 1 Rolle 109, 81 ER 364.

[786] 2 Bulst 270, 271; 80 ER 1114, 1115.

[787] 2 Rolle 258, 81 ER 785; Latch 79, 82 ER 284; Palm 315, 81 ER 1100.

[788] 2 Rolle 258, 259; 81 ER 785, 786; Palm 315, 81 ER 1101.

[789] Palm 315, 81 ER 1100.

confesse ceo, & conspiracy port sur ceo vers eux, & l'un est a cest jour in prison pur ceo."[790] It was also argued that "Et en le statute 18 E. 6. cap. 12. malicious prosecution d'un endictment de felony est joyne ove treason."[791] The Court finally resolved:

> que il nest ascun diversity perenter le case de felony & de treason, si le accusation soit falso & malitiose; car le dit statute de 28 E. 1. & 33 E. 1. ne font aseun difference, sed ils parlont indefinite de conspiracy& auxi Fitz. en le brief de conspiracy parle de conspiracy del' inditer generalment, Dyer fol. 116. " Auxi come Crewe & Jones, l'estatute de 8 H. 6. & 18 H. 6. done action de conspiracy de inditer home en auter countie pur treason, & come le offence est greinder si fuit {50} treason, & voyer, issint le crime est griever del' accuser home de treason, ou nest voyer.[792]

Thus, in deciding the issue, the Court relied and treated the blended action as basically principled by the same rules that applied to the writ of conspiracy. In the passage above, the medieval statutes that gave rise to the writ are invoked to make sense of this action. This shows how the new blended space was still connected to the input spaces.

Another issue related to the form of the indictment in the writ of conspiracy was whether the indictment must be of felony or could just be trespass or misdemeanor. The question was raised several times.[793] Although the courts were hesitant at the beginning to allow the action in this case, later they came to rely on a line of argument based on the connection between this blended action and the action for words. For that reason, the question of trespass will be discussed later. For now, I just wanted to point out that the argument that the action did not lie against indictment of misdemeanor can only be made in connection with the writ of conspiracy.

---

[790] 2 Rolle 258, 81 ER 785; "il remember, q[ue] deva[n]t le Chief Justice & luy m[esme] al Cambridge Assises. 2. Confess un malitious p[ro]secution vers un p[er] treason, & fueront indite de ceo, & comit al prison, & la remaine a cest temps," Palm 315, 316; 81 ER 1100, 1101.

[791] Latch 79, 82 ER 284.

[792] Jones W 93, 83 ER 48.

[793] *Gardner v Jollye* (1649) Style 157, 82 ER 608. *Low v Beardmore* (1666) Raymond T 136; 83 ER 73; 1 Sydersin 261, 82 ER 1093; *Loe v Bordmore* (1666) 1 Lev 169, 83 ER 353; *Henley v Burstoll* (1670) 2 Keb 494; 84 ER 310; *Norris v Palmer* (1676) 2 Modern 51, 86 ER 935; *Bringham v Brocas* (1678) 3 Keble 837, 84 ER 1042; *Anonymous* (1679) 2 Modern 306, 86 ER 1088; *Savile v Roberts* (1699) 1 Ld Raymond 374, 91 ER 1147; 5 Modern 405, 87 ER 733; *Savile v Roberts* (1699) 5 Modern 394, 87 ER 725; *Jones v Gwynn* (1714) 10 Modern 214, 88 ER 699; *Pedro v Barret* (1717) 1 Ld Raymond 81, 91 ER 951.

4.4.5.2 Defamation

The writ of conspiracy was concerned with the procurement of false indictments, a frame that embraced informal accusations out of court as well as plain corruption of the jury, if not the jury itself. Furthermore, the procurement of false indictments was mainly viewed as how the judicial wrong of false imprisonment was brought about. We sum up all this with the expression procuring wrongful prosecution.

The formal charge of a crime to a suspect orally before a JP, or written on a bill of indictment preferred to a grand jury could be and was framed as a sort of writ of conspiracy as we have seen (a special case of conspiracy as we will see later). But it could also be framed as an utterance of words imputing (in court) the commission of a crime upon someone causing them not only harm to reputation but also economic damages as a consequence of the former. Thus, from this point of view, the illocutionary force of these words, the fact that the imputation came in as a formal charge in a court of law, did not make any difference because this action for words was concerned not with the legal consequences of such formal charge but with its extrajudicial consequences. That is, it addressed the expenses made in the defense of the accusation and the loss of credit and reputation. Thus, the form of these blended actions not only included terms evoking the frame of the writ of conspiracy but also terms evoking the common law action for words.

4.4.5.2.1 Slander

In *Fuller v Cook* (1584), the plaintiff alleged that "he was discredited" as a consequence of a wrongful prosecution.[794] In *Savile v Roberts* (1699), the plaintiff alleged that by reason of a prosecution for a riot, "he lost his good name;"[795] In *Carlion v Mill* (1699), the plaintiff complained that an accusation of ecclesiastical offence had been made "to his discredit."[796] In *Goddard v Smith* (1704), the wrongful prosecution was said to have "very much hurt and injured in his good name, fame, credit, and reputation."[797]

---

[794] 3 Leon 100, 74 ER 567.

[795] 5 Mod 405, 87 ER 733. "In bonis nomine fama credentia et aestimatione suis praedictis quibus praeantea gavisus fuerit," 1 Ld Raym 374, 91 ER 1148.

[796] Cit. in 5 Modern 409, 87 ER 736.

[797] 6 Modern 261; 87 ER 1007.

This is as to the declarations of these blended actions. Sometimes, because of the presence of this direct reference to slander in the declaration, and sometimes simply because the imputation in court also licensed it, the frame of the action for words was evoked so that the appropriate arguments could be drawn. Thus, in *Barnes v Constantine* (1605), the court laid that an action that might be defeated on the grounds that the indictment had been erroneous if interpreted as a writ of conspiracy was indeed "but for damages for a slander, which well lies, although the indictment is erroneous."[798] In *Pescod v Marsam* (1607), it was laid that an action without acquittal was good because it "lies as well before as after the acquital, for the infamie by the indictment."[799] In *Bradley v Jones* (1614), the action was brought against one who had exhibited the articles of the peace against another arguing that he was an embracer and barretor. The action was upheld on the grounds that the defendant had moved his action from Chancery to the King's Bench, which could not be made, and since the action could not be continued the plaintiff could not clear himself "and the oath and affidavit in the Chancery doth remain as a scandal upon record,"[800] thus implying that the ground of the action was the slander. In *Payne vs Porter* (1619), the Exchequer Chamber, on an error that the mere exhibiting of a bill of indictment was no cause of action, laid that this conduct was nevertheless "a great cause of slander and grievance, and just ground of action for the plaintiff."[801] In *Wright v Black and Black* (1620), the defendant argued that a declaration that only alleged that a bill of indictment had been preferred was good because "by this the plantiff [sic] is defamed as much as if the defendants had said [it in public]… and this is more then [sic] a defamation by word, and though the indictment was not found."[802] The Court was divided with Hobert CJ opining that, indeed, "it is as great a slander to preferre a bill of indictment to the grand jury, and to give this in evidence to them, as it is to declare that in an ale house."[803] In *Gardner v Jollye* (1649), the court laid that in this action when "the charge of the indictment is for felony, [and] although the matter the party is

[798] Yelv 46, 80 ER 33.

[799] Noy 117, 74 ER 1081.

[800] Godbolt 239, 78 ER 239.

[801] Cro Car 490, 79 ER 418.

[802] Winch 28, 124 ER 24.

[803] Winch 28, 29; 124 ER 24, 25.

charged with be not felony,… a scandal lay upon him by it, and therefore the action lies."[804] In *Sir Andrew Henley v Burstal* (1669), however, it was laid that when the "indictment contains matter of imputation and slander as well as crime; there the action lies; but otherwise where the indictment contains crime without slander, as forcible entry, &c. but here is slander as well as crime."[805] In *Loe v Bordmore* (1666), it was moved in arrest of judgment that "the action did not lie for such an indictment which does not sound in scandal, but only in trespass… but where the indictment sounds in scandal, as felony, &c. there it would lie."[806] A similar objection was raised in *Bringham v Brocas* (1678), but the court disagreed because the accusation was "a matter criminal and slanderous."[807] In *Savile v Roberts* (1699), Holt CJ argued that among other wrongs, the blended action laid for "first, where a man is injured in his fame or reputation, so that his good name is lost; by reason of which injury, if the words themselves do not bear an action [of conspiracy], the loss or damage that may ensue, will… this action being but for damages for the slander, it well lies, although the indictment be erroneous; or, as it has been adjudged, if a bill be offered, and found ignoramus."[808] Finally, in *Jones v Gwynn* (1714) Parker CJ argued that with regard to the rule that "where the matter of the indictment, though it be not indictable, is infamous and scandalous, an action upon the case will lie; but that it is otherwise where the indictment contains matter neither indictable nor scandalous… there is no foundation for such a distinction, as where the matter of the indictment is scandalous, and where it is not."[809] Thus he concluded that "here was no reason for making a difference, when the matter of the indictment is scandalous, and when not. The cases before mentioned speak not a word of this difference; and if scandal be mentioned, it is only mentioned in the nature of damage."[810]

[804] Style 157, 82 ER 608.

[805] Ld Raymond 180, 83 ER 95. See also 2 Keble 494, 84 ER 310.

[806] 1 Lev 169, 83 ER 353.

[807] "3 Keble 837, 84 ER 1042.

[808] 5 Modern 405, 406; 87 ER 733, 734; see also 1 Ld Raymond 374, 378; 91 ER 1148, 1149-50.

[809] 10 Modern 214, 217; 88 ER 699, 700.

[810] 10 Modern 214, 219; 88 ER 699, 701.

4.4.5.2.2 VEXATION

As said earlier, the common law action for words was distinguished from the ecclesiastical defamation in that the former was based on the temporal loss as a consequence of the utterance of the words (and it should be reminded that temporal loss was not traversable when it could be implied from any of four categories of slanderous words). Early on, we find averments of temporal damage as a consequence of imputations made in court in the blended actions that were brought to court.

In *Doggate v Lawry* (1608), the plaintiff alleged that an ignored bill of indictment had "put [him] to great expenses."[811] The same circumstance led the plaintiff in *Payne v Porter* (1619) to declare that "he was inforced to great costs and charges for the defense of his good name and fame."[812] In *Mills v Mills* (1631), the plaintiff was said to be "much vexed" as a consequence of a procured indictment.[813] In *Henley v Burstoll* (1669), the complaint was that "he was put to great charge,"[814] and in *Norris v Palmer* (1676), that "he was compelled to spend great sums of money."[815] In *Savile v Roberts* (1699), it was complained that the plaintiff was "magnopere laesus ac in diversis negotiis licitis et honestis agendis multipliciter impeditus existit, verum etiam idem Jacobus valde graves et arduos labores subire et diversus denariorum summas pro acquietatione sua praedieta et ejus exoneratione in hac parte expendere et erogare coactus et compulsus fuit."[816] In *Carlion v Mill*, the plaintiff complained about having been put to "great charted and vexation."[817] In *Goddard v Smith* (1704), the plaintiff averred that he was "forced to expend and lay out divers large sums of money in and about acquitting and discharging himself of the said indictment, and defending his innocence,

[811] Cro Jac 190, 79 ER 166.

[812] Cro Car 490, 79 ER 418.

[813] Cro Car 8, 79 ER 809.

[814] 2 Keble 494, 84 ER 310.

[815] 2 Mod 51, 86 ER 935.

[816] 1 Ld Raymond 374, 376; 91 ER 1148. See also 5 Mod 405, 87 ER 733.

[817] Cit. in *Savile v Roberts* (1699) 5 Mod 409, 87 ER 736.

to the very great discredit and extreme impoverishment of him."[818] And in *Reynolds v Kennedy* (1748), it was said that "the plaintiff has been put to great costs and damages."[819]

As with slander, either the presence of these expressions or the imputation in court allowed lawyers and judges to evoke the frame of the action for words in order to raise arguments in court. In an anonymous case in 1635, Roll CJ opines that in the case of a bill of indictment not found it was "the trouble the party is put unto by reason of this endictment, is the cause of his bringing this action."[820] In *Atwood v Monger* (1653), in arreste of judgment, the defendant questioned the authority of the body which had convicted him upon presentment, and therefore the existence of harm. Twisden J argued that "the action is well brought, for it is brought for the vexation the plaintiff was put unto by reason of the presentment, and the other matter alleged, is but by way of inducement to the action," so that although the body did not have jurisdiction the action lied "for unjustly vexing him." Roll CJ agreed that the action lied "by reason of the vexation of the party, and so it is all one whether here were any jurisdiction or no, for the plaintiff is prejudiced by the vexation."[821] In *John Vanderbergh and James Vanderbergh v George Blake* (1662), it was conceded by the defense counselor that "the party that was molested being now by judgment of the court or other due proceedings of law acquitted or discharged… the law allows him recompence for such unjust vexation."[822] In *Norris v Palmer* (1676), the plaintiff demurred on the grounds that the action did not lie for trespass, to which it was replied that, given that, the plaintiff "was put to great charges."[823] In an anonymous case in 1679, the court laid that an action for an indictment of common trespass "will lie for the charges and expences in defending the prosecution."[824] In *Savile v Roberts* (1699), Holt laid that one of the damages that would support the blended action was "damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present

[818] 6 Mod 261; 87 ER 1007, 1008.

[819] 1 Wils KB 232, 95 ER 591.

[820] Style 372, 82 ER 788.

[821] Style 378, 379; 82 ER 793.

[822] Hadre 191, 195; 145 ER 446, 448.

[823] 2 Mod 51, 52; 86 ER 935.

[824] 2 Mod 306, 86 ER 1088.

charge. That a man in such case is put to expences is without doubt, which is an injury to his property."[825] In *Jones v Gwynn* (1714), confirming Holt's opinion, Parker CJ contended that "damage … to property, is there looked upon as strong as any."[826] In *Farmer v Darling* (1720), there was a motion for a new trial, and the defendant who argued that the damages were excessive said that "there could be no injury but to his property; there was none, to his fame. He could be intitled to no compensation for any thing else but pecuniary damage." The plaintiff replied that "this prosecution of the indictments was at the peril of the defendant's trade: which would have been destroyed," and that "the distress and vexation, and all the inconveniences the plaintiff was put to, may fairly be taken into the consideration of his damages, as well as the pecuniary expences." Lord Mansfield denied the motion on the grounds that the effect of the false indictments that the jury had found was to "to drive this plaintiff from his business of a poulterer, after having long carried it on. This was sworn to have been the prosecutor's view in preferring them. And they might affect the man's credit."[827] In *Chambers v Robinson* (1726), an action was said to lay upon an ill indictment because "a bad indictment serving all the purposes of malice, by putting the party to expence, and exposing him, but it serves no purpose of justice in bringing the party to punishment if he be guilty."[828]

4.4.5.2.3 Ecclesiastical Defamation

As said earlier, the action for words had been derived by analogy with the ecclesiastical offence of defamation as well as actions for defamation in local courts. That, at first, meant that the common law action for words was connected to the mental space of the ecclesiastical defamation. This can be seen in the presence of elements from the frame of the ecclesiastical offence such as the allegation of previous good reputation.

Defamation in ecclesiastical courts was thought of as a change in status, so that someone who was already of bad reputation could not be harmed by any imputation. At least, this followed from the *auctoritate dei patris* statute, which restricted the harm of defamation

[825] 1 Ld Raymond 374, 378; 91 ER 1148, 1150. See also 5 Mod 407, 87 ER 733, 734; 5 Mod 394, 87 ER 725.

[826] 10 Mod 214, 217; 88 ER 699, 700.

[827] 4 Burr 1971, 1974, 98 ER 27, 29.

[828] 1 Stra 691, 692; 93 ER 787.

to persons "not of ill fame among good and substantial persons.[829] Only someone who is held in high esteem and who is thought to be honest by his neighbors can be defamed.[830]

Thus, the presence of this allegation is another evidence of this blended action's connection to the action for words. In *Arundell v Tregono* (1608), the plaintiff declared that "he was of a good reputation, &c. free from theft."[831] In *Wright v Black and Black* (1620), it was noted that the plaintiff "was of good fame."[832] In *Smith v Crashaw* (1623), the averment was that the plaintiff "fuit un des bone subjects [de] le Roy."[833] In *Goddard v Smith* (1704), it was alleged that the plaintiff "is a good, true, faithful, peaceable, and honest subject and liege man of our lady the now Queen, and was of a good name, fame, reputation, conversation, behaviour, and condition, and as a good, true, faithful, peaceable, and honest liege man and subject of the said lady the now Queen, being without any scandal, imputation, or reproach, and hath not behaved or demeaned himself at any time from the time of his nativity hitherto as a barretor or disturber of the peace of the said lady the Queen, nor was in suspicion of the like crime amongst his neighbours and other subjects of the said lady the Queen to whom the said Richard Goddard [the plaintiff] was known, and by reason of his honest and quiet conversation aforesaid, for the whole time aforesaid, lawfully and honestly gained and acquired great credit and esteem, and also divers great gains and profits from his neighbours and other subjects of our said lady the Queen, with whom the said Richard Goddard [the plaintiff] had commerce for the support of himself and his family."[834] In *Jones v Gwynn* (1714), the plaintiff declared that "he had always maintained a good and honest character among his neighbours."[835]

Likewise, the argument that the common law courts have jurisdiction over ecclesiastical offences as long as there are consequential damages shows how lawyers evoked

[829] Helmholz, *Canon Law*, 572.

[830] Helmholz suggest that this allegation is clear evidence of the ecclesiastical influence, Helmholz, *Defamation*, xxxiv-xxxv

[831] Yelv 116, 80 ER 79.

[832] Winch 28, 124 ER 24.

[833] Latch 79, 82 ER 284; "il fuit un loyal subject," in Palm 315, 81 ER 1100.

[834] 6 Mod 261, 87 ER 1007.

[835] 10 Mod 214, 88 ER 699.

the frame of the action for words in order to bring in these blended actions for imputations in ecclesiastical courts. Thus, in *Norris v Palmer* (1676), where the defendant demurred on the premise that the action did not lie for an indictment of trespass, the Court did not grant it on the grounds that "the action would lie after an acquittal upon an indictment for a greater or lesser trespass: the like for citing another into the Spiritual Court without cause."[836] In *Carlion v Mill*, the action was brought because the defendant "without colour or cause of suspicion of incontinency… procured the plaintiff, ex officio, to be cited to the Consistory-Court, &c. and there to be at great charges and vexation until he was cleared by sentence, which was to his discredit and great expences."[837] In another case, the cause of action was that certain churchwardens had conspired "to draw the plaintiff within the ecclesiastical censures for adultery with A. S."[838]

4.4.5.3 Abuse (NON-JUSTIFIABLE Prosecution)

So far, we have seen how this blended action combined the frame of defamation as causing harm to reputation by words imputing an offence, and that of the writ of conspiracy as procuring a false indictment and imprisonment. The false imputation in court could also be conceptualized as an abuse or, in the language of the time, a perversion of justice. That meant the use of a legal process for an unlawful purpose other than that intended by the law, which in the context of prosecution, is bringing offenders to justice. It should be noted that from the point of view of this frame, the focus changes from the actual wrong (defamation) and the action that causes the wrong (imputation in court) to the mind of the person bringing the accusation. In other words, to say that a person abuses the law is to say that they are bringing about a legal process with a certain state of mind.

This concept of abuse appeared within the frame of pleading to the new action for words. Early on, the action was defended by pleading in confession and avoidance that the imputation had been made in due course of justice upon reasonable suspicion. [839] That is,

---

[836] 2 Mod 51, 86 ER 935.

[837] Cit. in *Savile v Roberts* (1699), 5 Mod 409, 87 ER 736; see also 5 Mod 394, 87 ER 725.

[838] Cit. in *Savile v Roberts* (1699), 5 Mod 405, 409, 87 ER 733, 736.

[839] Baker, *Spelman*, 235. Baker suggests that the plea was brought in analogy with the action by the writ of conspiracy (247), but in most cases the defense against the writ was brought by jurors rather than prosecutors, and they alleged that they were protected by their oath. Furthermore, a similar defense had been wielded in the

although harm to reputation by the imputation of an offense was admitted, it was held to be justified in that it had been made in the course of justice. Plaintiffs first responded with the general replications that the action was not in due course of justice but "de suis precogitatis malicia odio mundia et injuria et absque causis, etc."[840], but by the 1540s, they began to anticipate such defense by declaring that the prosecution was brought "ex perverse malicia et absque racionabili causa."[841] According to Baker, this practice gave birth to the action of malicious prosecution, as a special form of the action for words with the allegation of what later would be called special or express malice.[842] As this allegation would be traversed by the plea of what would later be called the privilege, the issue would revolve around the question of whether the defendant brought the action with malice or not. This will be discussed later, but for the moment I will try to establish what the concept of malice was in this plea.

The abovementioned expression "de suis propiis precogitatis malicia odio mundia et injuria" smacks of conceptual blending. For one thing, it reminds us of the expression *de odio et atia*, referring to the motives of a prosecutor. It also reminisces the expression *malice aforethought*, referring to the deliberate and not spontaneous nature of a criminal intention. Furthermore, *mundia* suggests a view of an impure corrupt heart, as the term *wickedness*. These things, indeed, point out to different aspects of the mind. Hatred refers to what we will call an emotion or a passion, which can be defined as a dislike towards someone coupled with a desire that that person should suffer pain. Deliberation or planning refers to our capacity to imagine and foresee goals and actions in advance, and finally wickedness refers

---

Ecclesiastical forum (Helmholz, *Canon Law*, 579, 580). Obviously, this plea presupposes an imputation of an offence in court. Thus, it is not clear whether the plea was to speaking the words in the course of justice or to bringing the charges. There is a clear difference between the two. In one case, the plea would include witnesses, but in the other it would be limited to prosecutors.

[840] Baker, *Spelman*, 236.

[841] Ib. The chronology is not clear, nor it is the causal relationship between allegations of malice and plea of privilege. There are early actions which declare special malice. In *Pare v Shakespeare* (1511) where "a single defendant was alleged to have maliciously *procured an indictment* in order to blacken the plaintiff's name and disinherit him." Cit. in p. 236, n (1). In an Anonymous case (1536) Fifoot *History and Sources* 141, the declaration laid that the defendant "contriving unjustly to prejudice the aforesaid R. and to deprive him of the good name and fame which he has hitherto borne from the day of his of his birth and to harm, detract from and corrupt the fame and report of his said good name and also to draw the said R. into perturbation and infamy."

[842] Baker, *Introduction*, 445; Baker, *Spelman*, 247. See also Plucknett, *Concise*, 497.

to a general disposition of character or attitude towards evil. How did all these come together, and what does it mean to combine them altogether in the expression above? The expression is usually interpreted as an intention or motive to cause harm, but in doing so intention and motive are assimilated. Yet one might have a motive to inflict harm, such as hatred, but not the intention to. And certainly, one might have the intention to cause harm, but not out of a desire to cause harm. And here is when the rubber hits the road of our problem of why intent and motive are frequently mistaken.

The plea *ex malicia sua praecogitata*, as a replication to the justification that a bill of indictment had been brought in due course of justice, should be understood against the backdrop of the frame of justifiable wrong. The plea of justification was in confession of the alleged wrong of defamation, but it pretended to avoid liability in that the wrong was committed in due course of justice. Thus, it was a very different strategy to deny slander and put it to the jury. And the natural replication was denying that the imputation in court had been brought in pursuance of justice and claiming instead that it had out of hatred with an evil heart.

Thus, within this frame, *malice* refers not only to the intention to cause harm but also to that intention as caused by an evil heart rather than by the desire to bring offenders to justice. Before we go over the presence of elements of this frame within the blended action, it is important to keep in mind that sometimes reference is made only to the intent to cause harm, presupposing an evil heart, and sometimes reference to the evil heart, hatred, and greed is also made. Furthermore, we should not forget that the allegation of *malice* in this context evokes the frame of justification or justifiable prosecution. That is, in this case, the allegation of malice implies the lack of justification (pursuance of justice) for causing someone to be slandered in bringing charges against them.

4.4.5.3.1 The Frame of Abuse within the Blended Action

This way, the mind of the defamer made its entrance into this blended action. Before I discuss how the frame of justification transpires in the form of this blended action and the arguments lawyers raised in court, I should first note that the terms we use today to refer to malice within the frame of defamation are *express* and *implied* malice. *Express malice* is usually referred to the allegation of an intent to cause harm in a specific and detailed way

rather than generically, using adverbial expressions like *maliciously*. This is intended to mean that this allegation will be later proved or disproved with evidence, which would be weighted by a jury. *Implied malice* by contrast, refers to these generic expressions entailing that malice will be presumed from the action or the circumstances surrounding the action, and that therefore it need not to be proved and found by the jury. These terms, therefore, background the frame of seditious libel, rather than slander in general, and refer to the problem of whether the intention of the defamer by libel was to be presumed by the judge or whether juries had a say in determining that seditious intention. But in this context, the question juries would have to answer was whether a prosecutor was justified in bringing an imputation in court or not.

Now as I said, at first sight, the allegations we are going to discuss now seem to mean nothing but intention to cause harm, but in this context, it should be taken rather as meaning an evil heart, that is, a desire that someone suffer harm springing from rage or greed, and which motivates the prosecution. That is why along with the allegations of ill will we will also find the term *maliciously*, which was traditionally used to mean 'intention to cause harm'. And that is why it is usually followed by the allegation that the prosecutor had no cause of suspicion in bringing the charge which was the requirement that protected innocents from wrongful prosecution.[843]

The Policy of Prosecution Frame and the Plea of Justification

As said earlier, as this new action was emerging, one of the issues that were raised was whether prosecutors should be held liable to civil litigation at all. From the get-go, this innovation was met with the opposition of part of the judiciary that was contrary to the idea of holding prosecutors accountable to an action for damages. This transpires in the arguments they made to allow prosecutors to make a plea of justification. The issue was indeed debated and framed normatively in court. The normative frames were that of what we might call efficacy or effectiveness of the law, and that of the protection of the innocent from prosecution. Indeed, one side tended to frame the innovation of a civil action as a problem of

[843] Bellamy, *Criminal Trial*, 29 shows that prosecutors by bill of indictment already framed their charges with allegations of public fama or common knowledge, so that if the defendant was acquitted, they won't be made to answer a writ of conspiracy. That is, the plea of reasonable cause was already available to defendants of conspiracy.

efficacy, that is, as throwing a stick on the wheel of criminal justice, thus concluding that the action should not be allowed, or at least that it should be allowed only in a number of cases. The other side tended to view the action as a means of controlling prosecutors and hence protecting innocent people from prosecution.

In *Jerome v Knight* (1587), Gawdy J seemed inclined to allow actions against prosecutors under certain conditions because "otherwise every one shall be in danger of his life, by such malicious practices."[844] In *Cutler v Dixon* (1585), the court is reported to have determined that action should not be allowed because "if action should be permitted in such cases, those who have just cause of complaint, would not dare to complain for fear of infinite vexation."[845] In *Throgmorton's Case* (1597), the counsels for the defense argued in arrest of judgment that prosecutions under conditions were to be protected because otherwise "it would be in hinderance of justice."[846] In *Arundell v Tregono* (1608), the defendant moved in arrest of judgment, and the court agreed with him, that "if men should be punished for preferring indictments, it would be a great hindrance of justice."[847] In *Willins v Fletcher* (1612), it was moved and held by the whole Court that the action did not lie because "then no man would dare to complain, if for so doing he should be liable to an action."[848] In *Wright v Black* (1620), Winch J opined that bringing bills of indictment to a court of justice "ought not to be punished by an action upon the case, for that will deterre and scare men from the just prosecutions in the ordinary way of justice."[849] In *Paulin v Shaw* (1649), it was argued in arrest of judgment and the court seemed to agree that these actions "would be a great discouragement to the execution of justice on malefactors."[850] In *Chamberlain v Prescot* (1659), it was said in arrest of judgment that "if it should be allowed, it would discourage

[844] Cro Eli 134, 78 ER 391. Cf. Cro Eli 70, 71; 78 ER 331 which reports Gawdy dissenting "that the action doth not lie, for then every felon that is acquitted [meaning by a Grand Jury] will sue an action against the party." It might be that he changed his opinion as this report is dated Trinity 29 Eliz and the other Pasch 30 Eliz.

[845] 4 Co Rep 14b, 76 ER 886.

[846] Cro Eliz 565, 78 ER 808.

[847] Yelv 116, 80 ER 79.

[848] 1 Bulstrode 185, 80 ER 873.

[849] Winch 28, 29; 124 ER 24, 25.

[850] T Jones 20, 84 ER 1127.

prosecutors."[851] In *Sir Andrew Henley v Dr. Burstal* (1669) , the defendant argued in arrest of judgment that "such action doth not lie, because it deters a man from prosecuting for the King."[852] And so did the defendant's counselor in *John Vanderbergh and James Vandervergh v George Blake* (1661): "If this action were allowed, it would discourage and overthrow all proceedings of this nature; because after judgment given for the informer, he would not be sure that he was in peace, but would be liable to be disquieted by another action for malicious prosecution; and this would be a mean to prevent, if not to subvert all justice, which the law protects and advance."[853] In *Loe v Bordmore* (1665), it was argued in arrest of judgment again that this action "would be too great a discouragement to persons to prosecute for the King."[854] In Savile *v Roberts* (1698), Holt CJ warned and the Court agreed, that "though this action will lie, yet it ought not to be favoured, but managed with great caution."[855] In *Jones v Gwynn* (1714), talking about a prosecution upon an insufficient indictment, Parker said that "the only remora to those actions is the fear of discouraging just prosecutions… [but] It is certainly not reasonable, that more favour should be shewed to a bad indictment than to a good one. It ought to be considered, that a small slip vitiates an indictment; and if that shall protect a man from an action, a way is opened for the malicious to ruin the innocent; for how easily may a slip be made on purpose?"[856] Along similar grounds, Lee CJ warned in *Reynolds v Kennedy* (1748), that "although an action will lie against one for proceeding wrongfully in an Inferior Court in many cases, yet it is a kind of action not to be favoured; and whenever such action is brought."[857]

On the other hand, in *Atwood v Monger* (1653), Roll CJ said that "I hold that an action upon the case will lye… if such actions were used to be brought, it would deter men from such malitious courses as are too often put in practice."[858] Likewise, in *Wright vs Black and*

[851] Raym T 136, n (1), 83 ER 73.

[852] Raym 180, 83 ER 95.

[853] Hadre 194, 197; 145 ER 447, 449.

[854] 1 Lev 169, 83 ER 353. See also *Low v Berdmore* (1665) 1 Syd 261, 82 ER 1093.

[855] 1 Ld Raym 374, 381; 91 ER 1148, 1151.

[856] 10 Mod 214, 218; 88 ER 699, 701.

[857] 1 Wils KB 232, 233; 95 ER 591.

[858] Style 378, 379; 82 ER 793.

Black (1620), Hobert CJ said that "it is true that the ordinary course of justice, ought not by any means to be stopped or hindred, and as that may not be obstructed, so neither may the good name of a man in any thing which concerns his life be taken away, and impeached."[859]

The Plea of Justification

The political issue as to what policy should be favored regarding prosecution has its technical translation in the argument as to whether the plea of justification was allowed in these actions, and if so, what its scope was, and thus, whether it was absolute for all prosecutors, or prosecutors were to be justified only to a certain length, under certain conditions. Moreover, there was a further discussion about what was and was not traversable by this plea, that is, what was going to be tried and what was to be formally alleged but merely presumed by law. In sum, wrongdoing such as slandering someone, putting him to expenses, or even causing him to be imprisoned was justified under certain conditions that must be pleaded by the defendant. But what did this plea and its replication consist in? Here, several slightly different ways of understanding what the justification was can be distinguished.

In Due Course of Justice

The simplest way to frame justification is by simply stating that the prosecution was carried out according to the due process.[860] That is, this is a merely formal argument that the wrong took place in the course of justice, as part of prosecution proceedings. Thus, in *Cutler v Dixon* (1585), it was argued that a prosecutor was justified because they "have pursued the ordinary course of justice."[861] In *Throgmorton's Case* (1597), an action was brought against someone for indicting someone as common barrator at the Sessions, who was acquitted afterwards. In arrest of judgment, Anderson and Beumond held that the action did not lie, "for when one prefers an indictment, and is sworn thereupon, it is to be intended that he prefers it lawfully."[862] In *Arundell v Tregono* (1608), after finding for the plaintiff, the defendant moved in arrest of judgment that he "has done nothing but in a course of justice to

[859] Winch 28, 29; 124 ER 24, 25.

[860] This position probably identified those who argued that the action would discourage prosecutors.

[861] 4 Co Rep 14b, 76 ER 886.

[862] Cro Eliz 565, 78 ER 808.

prefer an indictment, and that is lawful; for if men should be punished for preferring indictments, it would be a great hindrance of justice."[863] The court agreed with him. In *Bradley v Jones* (1614), where articles of the peace had been exhibited in two different courts, it was resolved by the court that "a man might pray the peace or good behaviour of any other man in any of the Kings Courts: but then it must be done in due form of law: and if he do it so, no action upon the case will lie."[864] In *Wright v Black and Black* (1620), the defendant moved in arrest of judgment that he had brought a bill of indictment against the defendant in the course of justice. Winch J opined that "the framing of an indictment in a Court of Record, is not any cause of an action, for it is a proceeding in an ordinary course of justice; and for that reason ought not to be punished by an action upon the case, for that will deterre and scare men from the just prosecutions in the ordinary way of justice."[865] In *Palke v Dunnyn* (1635), the defendant objected that the prosecution was alleged "solement d'estre fait ordinariment per un legal Proceeding."[866] In *Paulin v Shaw* (1649), it was excepted in arrest of judgment that exhibiting a bill of indictment "is in course of justice, and it would be a great discouragement to the execution of justice on malefactors."[867]

A more detailed view of what a prosecutor is in the course of justice is offered by Coke in *Knight v German* (1587). Coke distinguishes those cases in which a prosecutor acted in due course of law, as when "one come voluntarily into the Court and discover felonies, and if it be true which he saith, or if he come in Court and draw an indictment by the command of the justices, or if he be bound by order of law, to cause the party to be indicted, or to give in evidence, although he do it falsely," from those in which they come "gratis with malice in him before, and maliciously and falsely cause the party to be indicted."[868] He draws the distinction between those who were bound to prosecute at the sessions or assizes under pretrial process, and those who simply appeared to report crimes.[869] For Coke, the former are

[863] Yelv 116, 80 ER 79.

[864] Godbolt 239, 78 ER 239.

[865] Winch 28, 29; 124 ER 24, 25.

[866] Roll Abr fo 111.

[867] T Jones 20, 84 ER 1127.

[868] 1 Leon 107, 74 ER 99, 100.

[869] In Wright v Black and Black (1620), the defendant moved in arrest of judgment that he had brought a bill of indictment against the defendant in the course of justice Winch J. opined that "the framing of an indictment in

excused from liability in that they act under compulsion of the law. Regarding the latter, Coke wants to distinguish the honest and good-faithed prosecutors, who would be protected from liability, from those who are not.

Likewise, in *Hercot v Underhill & Rochley* (1615), Haughton J argued in a *dictum* that when a prosecutor brings a bill of indictment and "he was before bound by his oath to do this, and therefore urged, that this shall not be said to be done by him, malitiose."[870] And in *Carlion v Mill*, the defendant objected in arrest of judgment that "he did not cite him but as an informer, and by virtue of his office."[871]

Zeal of Justice

Sometimes, not only formal and objective prosecution was mentioned, but reference was made to the mind of the prosecutor, to what his motivation or purpose were. The prosecutor had to act not only in the course of a judicial proceeding, but also for justice's sake. In *Throgmorton's Case* (1597), an action was brought against someone for indicting someone as common barrator at the Sessions, who was acquitted afterwards. In arrest of judgment, Anderson and Beumond held that the action did not lie because "for when one prefers an indictment, and is sworn thereupon, it is to be intended that he prefers it lawfully, and in zeal of justice."[872] And in *Hercot v Underhill & Rochley* (1615), Croke J believed that when a felony was committed, after acquittal the defendant "shall not for this prosecution have this action, because this is in advancement of justice, and for the finding out and due punishing of offenders."[873] This plea indeed echoes the view that the oath protects the prosecutor as they swear that they bring the prosecutor in pursuance of justice, and not for revenge and/or lucre.

---

a Court of Record, is not any cause of an action, for it is a proceeding in an ordinary course of justice ; and for that reason ought not to be punished by an action upon the case, for that will deterre and scare men from the just prosecutions in the ordinary way of justice" (Winch 29, 124 ER 25).

[870] 2 Bults 331, 332; 80 ER 1163, 1164.

[871] Cit. in *Savile v Roberts* (1699) 5 Mod 407, 87 ER 734.

[872] Cro Eliz 655, 78 ER 808.

[873] 2 Bults 331, 80 ER 1163, 1164.

The usual replication denying that the wrong was not justifiable was to allege that it was not in pursuance of justice but "*ex malitia sua*," of his own malice, that is, it was his wrong, a wrong attributable to him for which he might respond. This formula was usually alleged by the plaintiff either in the form of the action or in the declaration, but it could also appear as a replication. In other instances, the term *maliciously* seemed to fulfill this function of denying justifiable prosecution. As Wray CJ put it, an "indictment being written and preferred maliciously, it is no reason but an action should lie to punish it."[874] The term *maliciously* was part of the form of the writ of conspiracy, and it appears in the declaration of many of these actions, but it does not seem to bear any particular meaning, nor does it necessarily convey something the plaintiff is ready to prove. Maybe because of that, sometimes the meaning is specified so that along with *maliciously* there are other expressions referring to the mind of the prosecutor. And here, the case-law shows different aspects of that mind.

The most common declaration does not refer to the motives of the prosecutor, but only to his unlawful intention to cause harm to the defendant by means of the prosecution. Thus, it appears in the declaration made by plaintiffs in anticipation of the plea of justification. In *Knight v German* (1587), it was alleged that the plaintiff had brought a bill "intending to detract from his name and fame, and put his life in jeopardy"[875] In *Wright v Black* (1620), it was declared that the defendants had preferred a bill of indictment "intending to make away his good name, and to cause him to lose his goods."[876] In that case, another case was mentioned in which the defendants had brought a prosecution against someone "intending to take away his good name" (ibidem). In *Palke v Dunnyn* (1635), it was alleged that "le Defendant falsò &maliciosè ambiit & conatus fuit a luy indicter del dit felonie, &c." at the Assizes.[877] In *Low v Beardmore* (1665), the plaintiff had brought an action "against the

[874] Cro Eli 70, 71; 78 ER 331.

[875] 1 Leon 107; 74 ER 99) (Cro Eli 70, 78 ER 331; "malitiose intendens querentem in nomine, vita, fama, & bonis defraudare".

[876] Which 54; 124 ER 46.

[877] Roll Abr fo 111.

defendant for falsely and maliciously indicting the plaintiff for a rescous."[878] In arrest of judgment, Twisden thought that "if the action had been laid more specially, viz. that the defendant knowing it to be false, did it purposely to vex him and to draw him into trouble, and to cause him to expend his money, perhaps the action had been maintainable."[879] In *Savile v Roberts* (1698), the record of the case reproduced in error the declaration of the plaintiff that the defendant "malitiose intendens ipsum Jacobum minus rite praegravare ac eum variis laboribus et expensis... opprimere et multipliciter damnificare."[880] Likewise, an action against certain churchwardens was brought because they prosecuted someone in ecclesiastical jurisdiction "to the intent to draw the plaintiff within the ecclesiastical censures for adultery with A. S."[881] In *Goddard against Smith* (1704), it was declared that the defendant "maliciously intending not only to deprive him the said Richard Goddard of his good name, fame, and esteem aforesaid, but also to bring him the said Richard Goddard into ignominy and public disgrace, that by reason thereof the subjects of the said lady the Queen might without themselves from the fellowship of him the said Richard Goddard, and might altogether cease and desist from dealing and having commerce with him in any manner…did falsly and maliciously prosecute and cause to be prosecuted the said indictment against the said Richard Goddard."[882] In *Jones v Gwynn* (1714), the defendant was said to "malitiosi intendens, & c. caused him to be indicted for exercising the trade of a badger without a license."[883]

It should be noted that while in most of these cases the intention of the prosecutors is qualified as tortious, either to cause harm to someone's reputation, and/or to vex them, sometimes a more felonious intention to take away the life of the innocent is alleged.[884]

---

[878] Raym T 136, 83 ER 73.

[879] *Loe v Bordmore* (1665) 1 Lev 169, 83 ER 353; "que si scienter & maliciose soit in le declar' & l'intent pur luy vex' &c. Et tout ceo prove sur le evidence come doit que le action gist," *Low v Berdmore* (1665) 1 Syd 261, 82 ER 1093.

[880] 1 Ld Raym 374-5, 91 ER 1148.

[881] Cit. in *Savile v Roberts* (1699) 5 Mod 407, 87 ER 734.

[882] 6 Mod 261, 87 ER 1007-8.

[883] 10 Mod 214, 88 ER 699.

[884] *Knight vs German* (1587), Cro Eli 70, 78 ER 331.

In keeping with this view of malice as intention to cause harm by prosecution, this intention must be proved directly by words,[885] or indirectly, as in *Johnson v Stancliff* (1641), where malice was inferred from the plaintiff having prosecuted criminally a case for which there was a civil action, and from the fact that after the prosecution failed, he indicted another person for the same offence. The court concluded contra that "for the party whose goods are stolen, may proceed both ways without malice, and also it was held a second Indictment may be preferred upon better Evidence without making the prosecutor liable to this Action."[886]

Sometimes, the motives that brought the defendant to prosecute are specified. Thus, in *Manning and Wife v Fitzherbert* (1633), the plaintiff declared that "the defendant ex malitiâ upon the plaintiff's wife crimen feloniae imposuit,"[887] In *Savile v Roberts* (1699), Holt J argued that "if there be an injury done to a man's property, occasioned by a wicked and malicious prosecution, it is all the reason in the world that a man should have an action to repair himself."[888] He further explained that in cases of prosecutions of trespass, "there must be express malice found, that it may appear that the prosecution was not for the sake of justice, but to gratify the party's peevish revenge or malice."[889] And in *Jones v Gwynn* (1714), Parker C. J explained that "the word "malitia" is an abstract of malus, which imports what is wicked, and can admit of no possibility of excuse. Among the Romans, it signified a mixture of hatred and fraud, and what was utterly repugnant to simplicity and honesty: and thus it is defined by Cicero, in his third book De Natura Deorum, and in this third book of Offices. Thus it is used in the civil law, and thus in our's."[890]

PREMEDITATION (*PRAECOGITATA*)

In *Jerom* v Knight (1587), the plaintiff had successfully brought an action against his prosecutor after she was indicted and acquitted thereof. She had alleged that the defendant, "intending to detract from his name and fame, and put his life in jeopardy, did maliciously

[885] "Any words of malice before [the indictment]" (*Jerom v Knight* (1587) 1 Leon 107, 108; 74 ER 99, 100.

[886] Reports of the Pleas of Assizes of York 85-86.

[887] Cro Car 271, 79 ER 836.

[888] 5 Mod 405, 407; 87 ER 733, 734.

[889] 5 Mod 405, 407; 87 ER 733, 735.

[890] 10 Mod 214, 215; 88 ER 699.

cause a bill of indictment of felony to be written, and the same being so written, at such a sessions of the peace at Newgate, exhibited the same to the grand jury."[891] The defendant moved in error that he "came into the Court where the sessions was holden, and complained of the plaintiff for the said felony, for which the justices there comanded her [the defendant] to cause an indictment to be drawn."[892] The issue, therefore, was whether the defendant was excused insofar he had brought the prosecution under compulsion of law.

Coke distinguished those cases in which a prosecutor acted in due course of law, as when "one come voluntarily into the Court and discover felonies, and if it be true which he saith, or if he come in Court and draw an indictment by the command of the justices, or if he be bound by order of law, to cause the party to be indicted, or to give in evidence, although he do it falsely"[893], from those other cases in which they come "gratis with malice in him before, and maliciously and falsely cause the party to be indicted."[894]

He further argued that the issue of malice should be put to the jury the same way as in murder, where "malice makes the difference betwixt murder and manslaughter," and insisted that when one comes before a justice of the peace and accuses someone upon *prima facie* evidence "and then upon examination he shall be bound to come and give in evidence against the party, &c. and in such case although that his evidence be false, yet he is not punishable."[895] And since in this case the jury had found an indictment that stated that the defendant came to court with a bill of indictment already drafted, Coke thought that this was liable "for the drawing of an indictment is not the office of a witness, but if it were by the commandment of the Court, or of one justice of peace, it should be otherwise, for there he goes by course of justice" and by way of analogy he added that "if one conspire with another, and afterwards he procures himself to be one of the indictors, his oath shall not excuse his malice before."[896]

---

[891] Cro Eli 70; 78 ER 331.

[892] 1 Leon 107, 74 ER 99.

[893] 1 Leon 107, 74 ER 99, 100.

[894] Ibidem.

[895] Ib.

[896] 1 Leon 107, 108, 74 ER 99, 100.

In this argument, to account for his distinction, Coke is frame shifting. First, instead of focusing on the allegation of ill will, that is, that the defendant was "intending to detract from his name and fame, and put his life in jeopardy,"[897] he chooses to focus on the fact that the defendant had prepared a false bill of indictment in advance of her coming to the quarter sessions, which Coke frames as malice aforethought, as deliberate wrongdoing. Thus, he draws an analogy between the frame of murder and this case, so that he can project the rule that malice aforethought is what distinguishes the prosecutor who brings a bill from he who simply comes to court and reports, and is made to make a bill, in the same way it distinguishes murder from manslaughter. Indeed, he frames the writ of conspiracy in the same way as encoding premeditated wrongful prosecution so that the oath of an indictor "shall not excuse his malice before," understanding the conspiracy as planned wrongful prosecution. In other words, he is framing conspiracy as planned wrongdoing, and making this deliberate or planned character of if the fulcrum of the liability, the same way it is in murder.

By the time this case was decided, there were two types of prosecutors. Those who were bound to prosecute at the sessions or assizes under pretrial process, and those who simply appeared to report crimes.[898] For Coke, the former are excused from liability in that they act under compulsion of the law. Regarding the latter, Coke wants to distinguish the honest and good-faithed prosecutors, who would be protected from liability, from those who are not. That prosecutor who "come gratis with malice in him before, and maliciously and falsely cause the party to be indicted," that his, who has planned to bring the false bill of indictment, is to be liable, because "this malicious intention and endeavour before the bill exhibited, is to be punished, although the indictment was lawful to be preferred by any one for the Queen."[899] Thus, with this argument, Coke moves from the question regarding the motives of the prosecutor, whether he comes to court out of hatred or greed, to the question

[897] *Knight v German* (1587), Cro Eli 70, 78 ER 331.

[898] Indeed, Coke will distinguish between two types of prosecutions concerning the problem of the liability of prosecutors. Those prosecutors who come under compulsory process of law, bound by a JP, and those who come spontaneously, voluntarily. This bears on the new practice of pretrial investigation and compulsion of prosecutors after the Marian statutes. In theory, this new kind of prosecutor is not only protected by his oath that he brings an accusation upon evidence, and not for hatred or profit, but also the compulsory process. Therefore, there are two types of prosecution: voluntary and process-compelled.

[899] The idea of premeditation also appears in Savile v Roberts (1699), where the plaintiff had declared that the defendant had prosecuted him "ex malitia sua praecogitata," Cro Eli 134, 78 ER 391.

of whether the prosecutor planned a wrongful prosecution. These are two very different questions to be put to a jury, since, whereas the former issue would require for the plaintiff to show in some previous circumstance the motives of the prosecutor, or imply it from the lack of a cause of suspicion, the latter issue can presume or imply the motive and the wrongful intent from the fact that the prosecutor had prepared a bill of indictment which was false.[900]

Sometimes, this planned wrong appeared not as premeditation and as an element destroying the possibility of justifying a prosecution, but as a punishable plan or collusion and the very cause of action. In *Cockshal and the Mayor of Boalton's Case* (1589), an action on the case was brought against the mayor of Bolton for having conspired and let a debtor out without bail to the delay of the creditor who had a pending suit with him. Periam J thought that the mayor was acting within the purview of his authority "for the not taking of bail is a Judicial act, for which he shall not be impeached."[901] However, the rest of the justices opined that "the not taking of bail is not the cause of the action, but the conspiracy."[902] This case was not properly of an imputation in court, but maybe because of the allegation of conspiracy, it was classified as action on the case in nature of conspiracy. It is true that it resembles *Jerom v Knight* in that for Periam is evoking the frame of justification of the wrong caused by the conduct of an official in the performance of his duties. But the other justices evoke the frame of planned action and the theory that planned action need not be consummated to be punishable as long as it has been put into execution. In that sense, the issue is not whether the defendant was or not justified in causing harm, but whether he had planned or not to cause harm.

In *Wright v Black and Black* (1620), an action had been brought against someone for preferring a bill of indictment. The plaintiff had not declared what the grand jury's verdict was, so Winch Justice argued that "this action upon the case, is in the nature of a writ of conspiracy, and for that reason there ought to be some act made, or else an action of conspiracy will not lye upon a bare attempt."[903]

---

[900] 1 Ld Raym 374, 91 ER 1148.

[901] 1 Leon 189, 74 ER 174.

[902] 1 Leon 189, 74 ER 174, 175,

[903] Winch 28, 124 ER 24.

Likewise, in *Skinner vs Gunton* (1670), an action on the case had been brought, alleging that the defendants

> by a conspiracy between them there first thereof had to aggrieve and impoverish the said plaintiff, and to cause the said plaintiff to be arrested at the suit of the said William Gunton, (one of the defendants,) and to deter the friends and neighbours of the said plaintiff from becoming bail for the said plaintiff, to the intent that the said plaintiff should be detained in prison for want of bail, and so without any just cause to lose and be deprived of his liberty, without any just cause levied and affirmed in the name of the said William, (namely, the said Gunton, one of the defendants,) a certain plaint of a plea of trespass upon the case, to the damage of the said William of 300l... [and] by virtue of the said plaint, caused and procured to be arrested and imprisoned, and to be detained in prison for the space of twenty days and nights.[904]

Upon not guilty pleaded, the jury acquitted all the defendants but Gunton, who moved in arrest of judgment. Initially, the counsellor for the defendant argued that "the writ is not generally machinantes & intendentes to grieve him, but barely a conspiracy," that is, arguing from the frame of the writ of conspiracy, this action did not lie, because there was no allegation of acquittal, but merely an allegation that the defendants planned to harm the plaintiff. However, the court thought that the action was not alleging "properly conspiracy, but a malitious agreement to charge the then defendant with a great action, to which he could not find bail… for here the conspiracy is but an inducement to the charging" [905]

In *Savile v Roberts* (1698), Holt met the objection that the fact that this action was grounded on the harm caused by prosecution was not supported by the ancient law, that is by the common law, because these cases "were grounded upon a conspiracy, which is of an odious nature, and therefore sufficient ground for an action by itself."[906] He replied that "that conspiracy is not the ground of these actions, but the damages done to the party; for an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie."[907]

---

[904] 1 Wms Saund 228, 85 ER 249. The parentheses are not mine.

[905] 2 Keble 473, 84 ER 297.

[906] 1 Ld Raym 374, 378; 91 ER 1148, 1150.

[907] Ibidem; "no action lies for the bare conspiracy, but it is the malicious prosecution which is the ground of the action," 5 Mod 405, 407; 87 ER 733, 735; the meaning of *bare conspiracy* as planned wrongdoing is clearly limited here to the framing of failed prosecutions, as Holt expresses in his final argument that "unless the bill be found, no action will lie, for that the party is not damaged ; neither is it a good ground of action or indictment against a man, that he barely procured him to be falsely indicted" (ib.). He nevertheless admitted that "the

The declaration in *Goddard against Smith* (1704) alleged among other things that the defendants "having had a conspiracy between themselves falsly and maliciously to cause the said Richard Goddard to be indicted as a barretor and public disturber of the peace…in prosecution and execution of their malicious intention and conspiracy aforesaid… falsly and maliciously caused and procured the said Richard Goddard… to be indicted."[908]

Dishonesty

As said earlier, one was justified if he prosecuted for the sake of justice, not to cause harm to someone. It followed that if he did so, and he still claimed to be acting for the king, he was being dishonest. Sometimes plaintiffs emphasized this bad faith, the idea that prosecutors knowingly pursued ungrounded actions, with expressions like, they acted "colourably, p[er] voy de execution del justice,"[909] "by colour of justice,"[910] "praetextus et colore justitiae et legis procressus."[911] In *Loe v Bordmore* (1665) 1 Lev 169, 83 ER 353, a similar expression after an inducement explaining that the plaintiff was not a dishonest person was that the defendant was not "ignorant of the premises."[912] In this case, Twisden J thought that an action grounded on a false indictment of trespass would perhaps have lied if special allegation had been made that "that the defendant knowing it to be false, did it purposely to vex him and to draw him into trouble, and to cause him to expend his money."[913] In *Carlion v Mill*, the defendant was said to have acted "upon pretence of fame."[914]

---

conspiracy, though it be not put in execution, is a crime, and is punishable in the leet." 1 Ld Raym 374, 379; 91 ER 1148, 1150.

[908] 6 Mod 261, 87 ER 1008.

[909] *Smith v Crashaw* (1625) Latch 79, 82 ER 284.

[910] *John Vanderbergh and James Vandervergh v George Blake* (1661) Hadre 194, 145 ER 447.

[911] *Savile v Roberts* 1698) 1 Ld Raym 374, 91 ER 1148.

[912] *Goddard against Smith* (1704) 6 Mod 261, 87 ER 1007 "praemissorum non ignarus." *Jones v Gwynn* (1714) 10 Mod 214, 88 ER 699; Parker CJ implied the lack of probable cause from "an averment of the plaintiff's honesty, &c. and that the defendant praemissorum non ignarus."

[913] "Que si scienter & maliciose soit in le declar' & l'intent pur luy vex' &c.," Low v Berdmore (1665) 1 Syd 261, 83 ER 1093, 1094.

[914] Cit. in *Savile v Robert* (1699) 5 Mod 405, 409; 87 ER 733, 736.

Another part of the case for justification was the plea that the prosecutor had acted with reasonable cause of suspicion. This allegation sometimes appears together with the mental element, and sometimes does so alone.

Sometimes, the whole plea of justification consists in the allegation that the prosecutor had a cause of suspicion. In *Jerom v Knight* (1587), Gawdy J argued that "if the party had taken upon him to proceed against the party upon any good presumtions, he might have pleaded it, as to say, he found the party in the house. suspiciously, &c."[915] In *Varrel v Wilson* (1589), the defendant pleaded "que ses biens fui feloniousment esloigne, & il eux trove en le possession le pl[aintiff]," and on demurrer the court held that "le justificac[i]on fuit bone, quia le trover des biens en le possession le pl' fuit sufficient cause de suspition."[916] Likewise, in *Doggate v Lawry* (1608), the defendant pleaded "he had divers sheep stolen, and missed divers others, which were found in the plaintiff's possession, going with twelve sheep which were stolen," to which it was replied that it was "de son tort demesne sans tiel cause." After the issue was found for the plaintiff it was moved in arrest of judgment that the defendant was justified as acting in the course of justice but the court did not agree, "for the plaintiff having laid it to be falsely and maliciously, and the jury having found it to be sans tiel cause, it all appears to be without any ground, and therefore he is punishable."[917] In *Johnson v Stancliff* (1641), the defendant pleaded and proved that the plaintiff "had goods stolen."[918]

Plaintiffs seemed to have assumed that this circumstance was part of their case and made this part of their declarations. In *Lovet against Fawker* (1614), it was said that the defendant "sine ullâ verâ et legitimâ causâ, procured the plaintiff to be indicted."[919] In *Wright v Black* (1620), the plaintiff alleged that the defendant "without cause… prefer a bill of

[915] 1 Leon 107, 108, 74 ER 99; *Knight v Jermin* (1587) Cro Eli 134, 78 ER 391 "If the defendant did it upon good presumptions, he ought to plead them; as that he found him in the house, &c. or the like cause of suspicion."

[916] Moor 600, 73 ER 785.

[917] Cro Car 190, 79 ER 166.

[918] Reports of the Pleas of Assizes of York, 85.

[919] Cro Jac 358, 79 ER 306.

indictment at the sessions of peace, containing that the plantiff stole two bundles of fetches."[920] In *John Vanderbergh and James Vanderbergh v George Blake* (1661), it was alleged that the defendant had brought an information "without any probable cause."[921] In *Skinner v Gunton, Lyon, and Leason* (1670), the plaintiff alleged that the defendant "without any just cause levied and affirmed in the name of the said William, (namely, the said Gunton, one of the defendants,) a certain plaint of a plea of trespass upon the case,"[922] In *Pollard against Evans and Others* (1680), the declaration was that the defendant "did procure the plaintiff to be causelessly indicted."[923] In *Savile v Roberts*, the prosecution was alleged to be "sine causa rationabili."[924] In *Goddard against Smith,* the case was that the defendants had planned to prosecute the plaintiff "without any cause or colour of such crime being committed by [the plaintiff], and thus had prosecuted him "without any lawful or true cause."[925]

Similarly, judges considered reasonable suspicion to be a necessary part of the case of the plaintiff, and not only a defense against the action. In *Throgmoton's Case* (1597), Walmsley thought that "there is not any reason, if any one, without cause, will procure another to be indicted, but that an action will lie against him."[926] In *Payne against Porter* (1618), the Exchequer Chamber upon a writ of error laid that "although the exhibiting of a bill upon true and just presumptions be excusable, and no action lies, yet [it is not the case] when it is alledged that he falsely and maliciously, without any such cause, had accused him of felony, and exhibited this bill falsely and maliciously."[927] In *Wright v Black* (1620), Hobert CJ said that "the good name of man in things which concern his life [ought not to] be taken away without good cause."[928] In *Atwood v Monger* (1653) Roll CJ held that the action lied

[920] Winch 28, 124 ER 24.

[921] Hadre 191, 194; 145 ER 446, 447.

[922] 1 Wms. Saund. 228, 85 ER 249.

[923] 2 Show KB 51, 89 ER 786.

[924] 1 Ld Raym 374, 91 ER 1148.

[925] 6 Mod 261, 87 ER 1007

[926] Cro Eliz 565, 78 ER 808.

[927] Cro Car 490, 79 ER 418-9.

[928] Winch 28, 124 ER 24.

"for maliciously bringing an action against him where he had no probable cause."[929] In *Norris v Palmer* (1676), Pemberton for the plaintiff argued that "it is now settled, that an action on the case will lie for a malicious arrest where there is no probable cause of action."[930] In *Jones v Gwynn* (1714), Parker CJ affirmed that "the grounds of this action are, on the plaintiff's side, innocence, and on the defendant's, malice."[931]

The relation between this element and the mind of the prosecutor was another of the issues. Was it necessary to avert and prove both? Could they imply each other? In *John Vanderbergh and James Vanderbergh* (1661), the action declared that the defendant had seized the goods of the plaintiff "unduly without any good cause" and prosecuted him "without probable cause."[932] Hadres for defendant argued that "unless were falsly and maliciously, conspiracy [action on the case of or action of] lies not… But if a man be prosecuted with all possible violence, and with apparent malice expressed in words or otherwise, yet if the prosecution were for a just cause, and the party be condemned, such action lies not, for the law takes no notice of malice, where the cause of the prosecution is not false."[933] In an anonymous case in 1679, the Chief Justice argued that in cases of indictment of trespass the prosecution would be considered to be malicious and liable to action for damages "though the prosecution be for a trespass for which there is a probable cause, yet after acquittal it shall be accounted malicious; the difference only is where the indictment is for a criminal matter: but where it is for such a thing for which a civil action will lie, the party can have no reason to prosecute an indictment ; it is only to put the defendant to charges, and to make him pay fees to the clerk of the assizes."[934] Thus, in this case, having a reasonable cause does not excuse the prosecutor. In *Savile v Roberts* (1698), Holt CJ laid that when the action is brought for a prosecution of trespass "if the indictment be found, the defendant… will not be bound to shew a probable cause, but the plaintiff will

[929] Style 379, 84 ER 793.

[930] Mod 51, 52; 86 ER 935.

[931] 10 Mod 214, 217; 88 ER 699, 700.

[932] Hadre 194, 145 ER 447.

[933] Hadre 194, 195; 145 ER 447, 448.

[934] 2 Mod 306, 86 ER 1088.

be constrained to shew express malice and iniquity."[935]. In *Carlion v Mill* there was a prosecution at an ecclesiastical court "maliciously, without colour or cause of suspicion." The defendant pleaded he was acting in pursuance of justice but the court replied that "he falsò et malitiosè caused him to be cited upon pretence of fame, when no such offence was committed, and avers, that there was not any such fame, so as he did it maliciously and of his own head."[936]. In *Jones v Gwynn* (1714), it was objected "that the indictment was declared only to be brought *falsò et malitiosè*, but not *absque rationabili et probabili causâ.*" Parker CJ, delivering the opinion for the court, argued that "this action cannot, indeed, be supported, unless the indictment was groundless, and without a probable cause," but that it was not necessary to put forward such words because "the word *malitiosè* implies it to be *absque rationabili et probabili causâ*."[937] Indeed, Parker suggested that the word means such circumstances (i. e. lack of probable cause) that would make a wrong inexcusable. He further argued that "it is to be considered, that the grounds of this action are, on the plaintiff's side, innocence, and on the defendant's, malice."[938] Thus, by this point, *malice* or the mental element was beginning to be identified with the absence of any reason for suspicion. We are on the verge of the distinction between express and implied malice. Thus, already by 1766, in *Farmer v Darling*, in a motion for a new trial, Lord Mansfield reported that he instructed the jury that "the foundation of this action was malice; which must be either express… [and thus] to consider of the implied malice, from the groundlessness of the prosecution."[939] The counsellors for the defendants argued that "malice alone is not sufficient: it must also be a prosecution without any foundation. These are two independent essentials to the maintenance of this action; there must be both malice and falsity." And they added that "whatever motive might induce the prosecutor to indict the person guilty of the offence. It would be of dangerous consequence, to make a prosecutor liable to this action, where there is a probable

[935] 1 Ld Raym 374, 381; 91 ER 1148, 1151.

[936] Cit. in *Savile v Roberts* (1699) 5 Mod 405, 87 ER 733

[937] 10 Mod 214-5, 88 ER 699.

[938] 10 Mod 214, 217; 88 ER 699, 700. Cf. *Jones v Gwynn* (1713): it was objected that "the declaration was, that the indictment was said to be falsò et malitiosè, and not absque probabili causâ." The court rejected the objection because "in the case of an [insufficient] indictment, *falsò et malitiosè* without *absque probabili causâ*, is enough: but had it been an action for a malicious prosecution, those words must have been in,"10 Mod 148, 88 ER 668-9.

[939] 4 Burr 1971-2, 98 ER 27.

cause for indicting an offender."[940] The court agreed that "that malice, (either express or implied,) and the want of probable cause must both concur."[941] Yet, if malice was implied from the lack of probable cause, only the latter was effectively to be laid down and proved, the former being a mere formalism. Conversely, in *Reynolds v Kennedy* (1748), an action was brought against a customs officer informer, after the jury found for the plaintiff, and judgment was arrested. Then on error it was moved that judgment should had been for the plaintiff. Lee C. K. argued that "whenever such action is brought, the express malice and grievance must be laid in the declaration, and proved; and it is not enough to say that the defendant brought an action against the plaintiff ex malitia, & sine causa." He further explained that "the gist of these sort of actions arises from some evil practice or malice in him who sues or prosecutes."[942]

Justification and the Prosecution of Treason

The tension between the control of prosecution through this action and the effectiveness of the law that underlined the frame of justification manifested itself with greater virulence in prosecutions of treason, particularly at the commencement of the Stuart period. The issue presented itself for the first time in *Lovet v Fawkner* (1614), where the plaintiff had been prosecuted for attempting to "persuade and withdraw the defendant, being a subject of the King, from his obedience, to the Romish religion,"[943] that is, it was treason for uttering words in favor of recusancy. After verdict for the plaintiff, the issue was arrested on the grounds that the jurisdiction of the judges who determined the indictment had not been correctly ascertained.[944] But Coke J, in an *obiter*, said that there was another more telling reason for which the judgment ought to be arrested. According to him there could not be action because there was no precedent of a writ of conspiracy brought for an indictment of

[940] 4 Burr 1972, 98 ER 28.

[941] 4 Burr 1971, 1974; 98 ER 27, 28.

[942] 1 Wils KB 232, 233; 95 ER 591.

[943] Cro Jac 358, 79 ER 306; *Lovett v Faukner* 1 Rolle 109, 81 ER 364; *Lovet v Faulkner* 2 Bulst 270, 80 ER 1114.

[944] Bulstrode reports that the judgment was arrested on that ground, 2 Bulst 271, 80 ER 1115. In the body of the text, Croke, who was a judge in this case, reports that "judgment was stayed," but in a note to that text, the editor warns that "no judgment ever was given." But this probably means that judgment was not given in the arrested proceedings, that is, that judgment was arrested. But judgment was given in the arrest proceedings

treason .[945] Coke went further and explained that this was so because "every man is bound to discover treason, and ought not to conceal it for the least time, because it is against the state of the commonwealth, which every one is in duty to maintain."[946] It would have been an embarrassment "if the powder traitors, for the prosecutions against them, might have had writs of conspiracy in case of high treason."[947] Furthermore, because "treason is secret, and lieth in the heart of man; and every one is bound to disclose such matters as tend thereto… [and it is] dangerous for any man to conceal any thing which may tend to treason" the action of conspiracy should not lie. Otherwise if would discourage the difficult prosecution of such critical offence.[948] Haughton J and Dodderidge J agreed that, "by his oath of allegeance, is bound to discover treason, and to have one punished for this, by an action upon the case in the nature of a writ of conspiracie, to be brought against him; this should be very hard… we will not give way to a president [sic], to make a new president [sic] in this case."[949]

The grounds for not allowing this action in cases of treason were a combination of formal and policy arguments. It was held first that by analogy with the writ of conspiracy, there was no precedent of such action. And the explanation for that was half political, half technical. The offence of treason concerned the security of the whole political community for which its prosecution should be a priority. Furthermore, being an offence that was difficult to detect and prove, as evidence of an intent to kill the king was gathered from circumstantial evidence or overt acts, especially in this case of treasonous words, allowing an action would discourage prosecutors. For that reason, it was advisable not to allow these actions, and consequently, a plea of justification was advanced in these arguments based on the oath of loyalty that would bind all subjects to reveal any knowledge they might have of this dangerous crime.

[945] Ib. As said earlier, this showed the presence of the frame of the writ of conspiracy.

[946] Ib.

[947] 2 Buls 270, 271; 80 ER 1114.

[948] Cro Jac 358, 79 ER 306.

[949] 2 Bulst 270, 271; 80 ER 1114, 1115.

This issue was revisited again, not as an *obiter* but as the main issue, in *Smith v Cranshaw* (1622).[950] In this case, Rowland Smith brought an action against Cranshaw and others alleging that they had complained to a JP that he had spoken treasonous words, and that, consequently, he had been arrested and imprisoned until the next Assizes where they brought a bill of indictment for these treasonous words. This bill was ignored by the Grand Jury.

The defendants moved in arrest of judgment that there was no precedent of writ of conspiracy for indictment of treason "quia ceo [treason] gist in le ceux [parrols] de home, & ne poet mults foits estre directment prove… & si conspiracy giseroit pur indicter un de treason, ceo represser homes de revealing ceo, car perchance le jury ne voilt luy sole credit." Furthermore, Cranshaw's plea was good because "si jeo scavera jeo, si ceo ne reveal ceo, jeo incur misprision de treason." And the precedent of *Lovet v Fawkner* was mentioned in support of this argument.[951]

The counselor for the plaintiff replied that action and writ lied for both accusations of felony and treason "car ambideux sont choses encounter le bien publick coment nient en owell degree." He further argued in defeat of the justification advanced by the defendant that "le malitious imputation de ceo al un que est pluis honest, que le accuser mesme, coment poet estre pluis digne de punishment, & le pluis inconvenient, que tiel malice serra impunie." By *malice* he meant the "prosecution sur le bitter fruit & nourished ove long & inveterate malice purtary ove grand violence, & hatred oi a most devilish mind, not onely to deprive an innocent of life, but even of his reputation, and brand him with parrande, & stigmatize tout son posterity, come le offspring."[952]

The Chief Justice thought that the action did not lie because there was no precedent by the writ of conspiracy, and agreed with the arguments of policy and the technical difficulties involved in the prosecution of treason, as well as with the justification pleaded by

[950] 2 Rolle 258, 81 ER 785; Palm 315, 81 ER 1100; W Jones 93, 93 ER 298; Latch 79, 82 ER 284; Smith v Chrashaw, Sprat, & Ward (1625) Latch 79, 79 ER 618; Smith v Crashaw (1625) Benl 152, 73 ER 1019; Smith against Crashaw, Ward, and Ford (1625) Cro Car 15, 79 ER 618; Smith v Cranshaw & Alios (1625) Jones W 93, 83 ER 48.

[951] 2 Rolle 258; 81 ER 785.

[952] 2 Rolle 258-9; 81 ER 785-6.

Cranshaw.[953] Haughton J by contrast adopted a compromising technical view on the issue and opined that "s[er]ra mischievo[us], si s[er]ra dispunishable p[ur] accuser de subject ove treason,"[954] and that "que si le malice soit prove, & le party quitt conspiracy giseroit."[955] However, the action could not lie in this case because "est trove un ignoram[us] solem[en]t, q[ue] ne acquit le pl[ein]t[if] del treaso[n], mes est lyable a ceo, p[ur] q[ue] intant q[ue]n'est acquit de ceo, n'avera action."[956] Doddridge J agreed with the Chief Justice that "ou conspiracy est port for accusing another for trayterous parolls, he may by plea discharge himself, as if he say, that he heard the plaintiff per le tiels parolls, & come ceo fuit son duty il revealed ceo, & les justices caused luy destre indicted accordant."[957] However, if the plea was general to the action, the action did lie "si soet trove culpable p[ur] indictm[en]t, & apres acquit sur son arraignm[en]t," but it did not "si le p[ar]ty no soet acquit del crime, come n'est icy sur le ignoram[us], la ne gist, & le jury in ceo action ne luy acquit del treason, mes solem[en]t trove un malicio[us] p[ro]section."[958] And where "le p[ar]ty ad estre cleare, & legitimo modo acquietatus, n'est questio[n] forsq[ue] un conspiracy gist in case de treason, cy bien q[ue] in case de felony."[959]

And though the plea in this case did not seem to stand because "per verdict in cest action est trove que tout fuit sur malice," the matter of fact was that "cest verdict [does] no acquitt luy de le indictment & pur ceo jeo pute, il parle dubiously que judgement no serra done, & action no gist." But he did not believe that *Lovet v Fawkner* was a good precedent since "le judgement fuit estoppe pur misrecital del' statute."[960]

In conclusion, the court decided that the action could not lie without the acquittal of the plaintiff because the prosecution of treason was a matter of great importance and allowing it would discourage it for the reasons explained. And it was held that an ignoramus did not

[953] 2 Rolle 258, 259-60; 81 ER 785, 786.

[954] Palm 315, 316; 81 ER 1100, 1101.

[955] 2 Rolle 258, 260; 81 ER 785, 786.

[956] Palm 315, 316; 81 ER 1100, 1101.

[957] 2 Rolle 258, 260; 81 ER 785, 786.

[958] Palm 315, 316; 81 ER 1100, 1101.

[959] Ib.

[960] 2 Rolle 258, 260; 81 ER 785, 787.

clear the prisoner from suspicion and they could be held to further prosecution. It neither made the indicting jurors perjurers. However, they agreed that "p[ur] tiel p[ro]secution malicious, le p[ar]ty serra indite p[ur]le Roy."[961]

In this decision, Justices Robert Houghton and John Doddridge, along with Chief Justice James Ley, were sitting at the King's Bench, but Thomas Chamberlain was absent. As Houghton died in 1624 and Chamberlain in 1625, and Ley stepped down in 1625, James Whitelocke, Willian Jones, and Randolph Crewe were appointed to replace them. Perhaps these changes encouraged the plaintiff to bring a new action upon the same grounds. All the defendants pleaded generally except Cranshaw who pleaded by way of justification that "le dit Sprat dit a luy, q[ue], le plaintiff ad dit ceux parols, & a discharge luy mesme del aspersion de concealement del treason, il accuse luy devant un justice, & ad luy arrest. Absque hoc, quod falso conspir. &c."[962] The jury found for the plaintiff and the verdict was moved in arrest of judgment again.

Like in the former action, it was objected that the action did not lie "si le accusation fuit pur felony," because the plaintiff could not allege an acquittal. And that "coment action pur tiel accusation pur felony est bien maintenable tamen pur accusation pur treason il ne gist."[963] The reason the action was not sustainable in case of treason was that "quia c[eo] est un tender cas; quia si l'action serra maintainable, voil estre un terror al subject de prosecute un pur treason," while at the same time "si le subject conceale le treason, donq[ue] est en danger d'estre an traytor."[964]

The plaintiff's counsellor argued that in cases of felony "un action sur le case en nature de conspiracy [gist] apr[es] ignoramus trove. A fortiore ad estre enditer del treason, q, est un pluis transcendent crime." To this the defense replied that "treason concern le Roy, & le publiq[ue], state; & nemy folony [sic], mes solement le concerne d'un private person: et pur c[eo] le ley permitter en c[est]: case de felony, le party d'aver un action a remedier le tort fait a luy: mes nest ascun tiel action en case del treason." As for *Lovet v Fawkner*, the

[961] Palm 315, 317; 81 ER 1100, 1101.

[962] Latch 79, 82 ER 284.

[963] Jones W 93, 83 ER 49.

[964] Latch 79; 82 ER 284.

defendant's counsellor argued that "la fuit un judgement en case de treason sur nihil dicit, & un breve d'enquire de damages, nul judgement fuit pur les dammages, quia nul president puit estre trove."[965]

The court did not arrest judgment, and they held that the action lied. It seems that the justices had reached this conclusion through different ways[966] though in the reports their opinions are not distinctively identified. The issues they addressed can be divided into three: Whether there was any precedent of actions against prosecutors of treason, and whether *Lovet v Fawkner* was a good precedent that it did not lie; whether the prosecution of treason was justifiable or not; and whether an action against a prosecutor could lie without previous acquittal of the plaintiff. Of course, the answers to these questions would depend on the different frames evoked.

With regards to the first issue, it was argued that among other sources the "statute de 28 E. 1. & 33 E. 1. ne font ascun difference, sed ils parlont indefinite de conspiracy."[967] And the action in *Lovet v Fawker* was stayed because "il want le parol (falso), quia falso, & malitiose doient estre en le declaration, pur q, le declaration ta fuit male,"[968] not because it was held that actions did not lie for accusation of treason.

With regards to whether the prosecution of treason was justifiable, it was argued that the defendant "poet doner notice del' son conusans ou suspition, sed null est tenust de reveal ceo, que nest voyer neq[ue]; de accuse ascun de treason malitiose sans verity"[969] And in this case it had been found that "fuit fait falso & malitiose de son mesme teste, & sans ascun ground,"[970] and also "had sworn the matter thereof to be true, whereas it was false, and they knew it to be false."[971] For it was argued that if prosecutors could bring such actions without fear of any legal consequence "then no person would be safe…. and the parties endangered

[965] Ib.

[966] Latch 79, 80; 82 ER 284; Jones W 93, 83 ER 48, 49; Cro Car 15, 16; 79 ER 618, 619.

[967] Jones W 93, 95; 83 ER 48, 49; see also Cro Car 15, 16; 79 ER 618; Latch 79, 80; 82 ER 284.

[968] Latch 79, 80; 82 ER 284,

[969] Jones W 93, 95; 83 ER 48, 50.

[970] Latch 79, 80; 82 ER 284.

[971] Cro Car 15, 16; 79 ER 618.

thereby should have no remedy."[972] Thus, the plea defeating justification would include malice, lack of suspicion, and falsehood. As for the relation between these three elements it was said that the action did not lie "si le prosecution soit falso sed nemy malitiose, sed tamen voyer, null action gist car malice, & bon informe & false information si malicious null punishment, mes lou contra cognitam veritatem falso & malitiose prosecute un pur son vie, & il receive losse pur ceo action gist."[973]

Finally, regarding the issue as to whether the action lay without the previous acquittal of the plaintiff, Jones argued that the action did lie because the writ of conspiracy was in affirmance of the common law that "false accusations & conspiracies concernant le vie d'un home al common ley fuit offence & injury al party coment null indictment fuit preferre."[974] A different, formalistic argument was that "sont 2 briefs ou actions pur conspiracy, l'un le brief de conspiracy enserte en le register, & l'auter est un action sur le case, & si home port brief de conspiracy mention en le register il doit estre indicte & acquitte, & si ne soit acquitte null action gist." And yet another argument was based on the harm caused the action, because "un endeavour falso & malitiose d'indicter home per que est grieve per imprisonment ou auterment coment que fuit un ignoramus sur ceo." [975]

In *Lovett v Fawkner*, it was argued that prosecutors of treason were protected from civil actions as long as their accusations were grounded on suspicion, without malice, and they had been admitted by a grand jury. The way this was framed was through the plea of justification. The content of such plea within this frame of prosecution of treason was a general duty to reveal treasons grounded on the oath of alliance. The prosecution of treason, by the way, was framed as a matter concerning the security of the political community, by contrast to the prosecution of ordinary crime. Within this frame, as within the frames of prosecution of crime in general, the term *malice* as 'ill will,' appears as a replication to the plea of justification along with lying and lack of reasonable suspicion.

[972] Cro Car 15, 16; 79 ER 618, 619.

[973] Jones W 93, 94; 83 ER 48, 49.

[974] Jones W 93, 83 ER 48, 49.

The core of this idea was confirmed in *Smith v Cranshaw*, but there was still the issue of determining at what point of the prosecution prosecutors were liable to civil actions. In *Lovett*, it had been laid down that unsuccessful prosecutions were not liable. This conclusion had been reached by reasoning in terms of the writ of conspiracy. Thus, the issue was seen through the frame of the action of conspiracy and its acquittal requirement. After all, this new action was emerging from the blend of the frame of the writ of conspiracy with that of the action of defamation. It was suggested indeed that this was a new action different from the action of conspiracy in that there was no acquittal requirement, nor joint liability. However, in order to overcome this argument, others tried a frame shift. Thus, the frame of the action for defamation was evoked where the grounds were the damages because of the imputation. And also, the frame of planned wrongdoing was evoked, that is, framing the failed prosecution as a deliberate act in execution of a previous plan. Indeed, the plea of justification and the attempt are combined in the statement that "un serra charge fauxment, & malitiousment pur treason, c[eo] est un tort al Roy de traher le vie de son subject en question sans cause."[976]

4.4.6 Perjury

It is possible that lawyers also toyed with the idea of framing the failed prosecution as perjury, as prosecutors swore to the truth of the facts alleged in the bill of indictment. The frame can be viewed in the plaintiff's allegations. In *Knight v German* (1587), it was alleged that the plaintiff exhibited a bill of indictment "et falso deposuit omnia in ea contenta fore vera."[977] In *Arundell v Tregono* (1608), the plaintiff declared that "the plaintiff at the same time affirmed the matter in the said bill contained to be true."[978] In *William against Fletcher* (1612) the defendant "preferred a bill of indictment against Willins for being a common barretor, and he was sworn before the justices of peace, that the matter in his bill contained was true."[979] In *Hercott against Undehill* (1615), Doddrige J remarked that the defendant "did exhibit his bill… and… he took a false oath."[980] In *Payne against Porter* (1619), the

[976] Latch 79, 82 ER 284.

[977] Cro Eli 70, 78 E 331.

[978] Yelv 116, 80 ER 79.

[979] 1 Bulst 185, 80 ER 873.

[980] 2 Bulst 331, 80 ER1164.

action alleged that the defendant "exhibited it to the grand jury in the county of Nottingham, and affirmed the matter in the bill to be true, ubi revera it was false."[981] In an anonymous case cited in *Wright v Black* (1620), it was said that the defendant "exhibited a bill of indictment, containing that the plantiff did felloniously ravish the said Dorothie their daughter, and did give this in evidence to the grand jury."[982] In *Smith v Cranshaw* (1623), the action laid down that one of the defendants "jure malitiose & falso le dit indictment estre voier lou fuit faux."[983]

4.4.7 The Emergence of the Action on the Case

So far, we have seen how in the course of the sixteenth and seventeenth centuries a new action on the case made its appearance in the common law courts to control prosecutors and protect innocents by giving a civil remedy to defendants in court. Specifically, these actions claimed damages against individual prosecutors, who brought bills of indictments that may or may not have been ignored or quashed. We have seen how this special case was framed by analogy to other existing forms of action in a blended space which drew from different input spaces, such as the frame of the writ of conspiracy, or the frame of defamation. Indeed, lawyers tried to bar or move forward this action drawing arguments from these input spaces, if not directly arguing that there was a remedy already. In other words, they basically thought of the new action in terms of an existing one. However, in the course of these arguments, and because of them, a new emergent structure or frame began to crystallize. This becomes apparent in the belief that this was a distinct form of action different from its models. Indeed, as we will see later, by the end of this period an even more general structure emerged, which unified the whole field of the procedures against prosecutors. This change, in point of fact, is most important to understand the changes that took place in the conceptual structure of conspiracy during this time.

---

[981] Cro Car 490, 79 ER 418.

[982] Winch 54, 124 ER 46.

[983] 2 Rolle 258, 81 ER 785. Also reported as "cause un bill de indictm[en]t de dit treason d'estre preferr[ed] vers luy, & done' evidence vers luy, & sweare le dit evidence vers luy d'estre voyer," Palm 315, 81 ER 1100; "preferre un bill de indictment de treason versus luy, & sur ceo ils jure que le dit bill fuit voier," Jones W 93, 83 ER 48.

At first, courts took this action on the case to be derived from the writ of conspiracy, hence the expression *action on the case in the nature of conspiracy* to refer to it[984] to import that it was a form of action identifiable by formal or procedural differences with the writ of conspiracy, but in all the rest governed by the same rules that governed the writ. Fitzherbert may have been the first to talk about some writs of conspiracy: "Writs of conspiracy grounded upon Disceit, and Trespass upon the Case; which are properly Actions of trespass upon the Case."[985] There is an intrinsic ambiguity in this passage that indicates that Fitzherbert did not know whether to put these cases in one category or another. As seen in the first chapter, the scope of medieval conspiracy was broader. As a matter of fact, it is not clear whether the cases of prosecution of trespass, forgery and deceit, and impersonation that Fitzherbert lists after this passage are to be considered actions on the case or writs of conspiracy. All this indicates that probably no one before Fitzherbert had referred to a trespass on the case[986] on the basis of the writ of conspiracy.

In any event, at the opening of the section about the writ of conspiracy, as Fitzherbert describes the form of this writ, he adds by way of commentary that:

> This writ lieth against two Persons at the least who do so conspire; for if one Person of Malice and false Imagination do labour and cause another falsely to be indicted, the Party who is so indicted, shall have a Writ of Conspiracy, &c. but an Action upon the Case against him who so caused him to be falsely indicted.[987]

Hence, in this passage he suggests not only that the action on the case derives from the writ of conspiracy, but that the main difference between them is a formal variation. The writ is limited to joint defendants, but the action can be brought against individual ones. But it seems that both share the previous acquittal of the plaintiff requirement. In other words, it

---

[984] The expression *action on the case in nature of a conspiracy* also appears in *Marsh v Vauhan and Veal*, Cro Eliz 563; *Manning and his Wife v Fitzherbert* (1633) Cro Car 271, 79 ER 836; *Lovet v Faulkner* (1614) 2 Bulst. 271-2, 80 ER 1115; *Skinner v Gunter and Lyon* (1670), 2 Keb 497, 84 ER 312; *Pollard against Evans and Others* (1680) 2 Show KB 51, 89 ER 786; although normally it merely appears as action on the case: Shotbolt's Case (1586)1 Godbolt 76, 78 ER 47; *Knight v German* (1587) Cro Eli 70-1, 78 ER 331; *Smith v Cranshaw* (1622) 2 Rolle 258-60, 81 ER 785-6; *Smith v Cranshaw* (1622) Palm 315-6, 81 ER 1100; *Smith v Cranshaw & Alios* (1625) Jones W 93-4, 83 ER 48-9; *Smith v Crashaw* (1625) Latch 80, 82 ER 284-5; Smith v Crashaw (1625) Benl 152, 73 ER 1019; *John Vanderbergh and James Vanderbergh v George Blake* (1661) Hadre 194-6, 145 ER 447-8; *Skinner v Gunton and Lyon* (1670) 2 Keb 476, 84 ER 298.

[985] FNB 116 B.

[986] Indeed, the category *trespass on the case* came to be used by this time.

[987] FNB 114 D.

is suggested that the action on the case had been born to give remedy to this situation which was not redressed on merely technical grounds.

How should we understand the passage above in the light of this one? The action on the case described here is much narrower than the one described above and which was supposed to be grounded on specific harms such as deceit and trespass (used in a general sense). One explanation is that maybe Fitzherbert is trying to make this action on the case look a little older that it was. Precedents of actions of conspiracy against a single defendant dated back to a few decades only. Maybe Fitzherbert thought that these precedents were related to earlier fourteenth and fifteenth precedents of writs of conspiracy where the gist was not the procurement of a false indictment.[988] Thus, by making this action on the case of conspiracy to look older that it probably was he gave it the texture of a form of action. Indeed, in a subsequent passage he combines both ideas: "if the Writ of Conspiracy be brought against two, then it shall be said properly a Writ of Conspiracy. But if it be brought against one Person only, then it is but an Action upon the Case upon the Falsity and Deceit done, because one Person cannot conspire with himself."[989]

However, it might be, the case-law shows how courts entertained this idea that there was an action on the case of conspiracy based on this formal distinction. Thus, in *Shotbolt's Case* (1586), Clench J opined that "there was no difference betwixt an action on the case, and a conspiracie, in such case, but onely this, that a conspiracy ought to be by two at the least; and an action upon the case may lie against one."[990] In *Knight v German* (1587), Wray CJ argued that "if two conspire maliciously to exhibit an indictment, and the party be acquitted, he shall have a conspiracy; so when one doth it, this action upon the case lieth."[991] In that case Coke agreed that, "as a writ of conspiracy lieth against two, so here against one."[992] In *Throgmorton's Case* (1597), referring to the writ of conspiracy, Anderson and Beaumond explained that "where two or more conspire together to procure one to be indicted

[988] Indeed, the historiography on the action on the case picked up on that belief and made it the explanation as to the genesis of the action of malicious prosecution, as abovementioned.

[989] FNB 116 L.

[990] 1 Godbolt 76, 78 ER 47.

[991] Cro Eli 70, 71; 78 ER 331.

[992] *Knight v Jermin* (1587) Cro Eli 134, 78 ER 391.

of felony or trespass, and he is afterwards acquitted, it shall be intended by law to be maliciously done, for which conspiracy lies; but no action lies, where only one prefers a bill of indictment."[993] Now, since there is no mentioning of an alternative form of action for this circumstance, it follows that they did not believe this action stood in court. In *Marsh against Vauhan and Veal* (1599), on the issue of whether the writ should abate on account that one of the two defendants was found not guilty of conspiracy, the court laid that "a writ of conspiracy lies not, nor is maintainable upon this verdict. But an action upon the case, in nature of a conspiracy, might have been brought in this case."[994] In *Lovet v Faulkner* (1614), Coke cited *Knight v German* (1597) as "the first case, of an action upon the case brought for a conspiracie, and in that case it was ruled, that the writ of the conspiracy lieth not, but in case where two do conspire; and if onely one, then an action upon the case, in the nature of a writ of conspiracy lyeth."[995] In *Smith v Cranshaw & Alios* (1625), the Court laid down that "un brief de conspiracy ne gist vers un, car un ne poet solment conspire, car le brief de conspiracy ayant un precise forme ne poet estre extende ultra le forme, sed le action sur le case nest lye al ascun precise forme, mes est destre frame come le matter require ideo gist, coment que un solment fait."[996] In *Skinner v Gunton and Lyon* (1670), the defendant argued in arrest of judgment that "it is an action of conspiracy, which doth not lie against one only"[997] . The defendant replied that "albeit onely one be found guilty… this being an action sur case in nature of a conspiracy, and not a conspiracy at common-law."[998] It was held that "this is but an action sur case and no formed action it is sufficient, as Marsh and Vaughan 3 Cr. 701,

[993] Cro Eliz 565, 78 ER 808.

[994] Cro Eliz 702, 78 ER 937.

[995] 2 Bulst 270, 271; 80 ER 1114, 1115.

[996] Jones W 93, 94; 83 ER 48, 49.

[997] Raym T 176, 83 ER 93. "That here is an action of conspiracy which charges the defendants, that per conspirationem inter eos habitam, they caused a plaint to be levied, and the now-plaintiff to be arrested thereon, and all the defendants, except one, (namely, Gunton,) are acquitted, and therefore this action fails; for one defendant cannot conspire alone ; as is F. N. B. 115 E.; and although the plaintiff might have an action upon the case against the three defendants, or one defendant only, and if one had been convicted thereon, the plaintiff should have judgment against him, yet here the plaintiff has chosen an action of conspiracy, which is found against him, because the defendant Gunton alone could not levy a plaint, and cause the plaintiff to be arrested per conspirationem, as this action supposes," 1 Wms. Saund. 229, 85 ER 251.

[998] 2 Keb 497, 84 ER 312.

& F. N. B. albeit onely Gunton is found guilty, which the Court agreed"[999] Furthermore, it added that "the writs being the same, it's one or the other, as the plaintiff titles it, albeit the word conspiracy be used."[1000] Morton J dissented because he "was of opinion that it was an action of conspiracy."[1001] The reporter noted that "it seems to me that the plaintiff ought not to have had judgment in this case, because it appears to be a formed action of conspiracy by these words, namely, per conspirationem inter eos habitam. And the verdict has falsified the declaration; because by the acquittal of all the defendants but one, the verdict has in effect found that it was not by conspiracy, as the plaintiff has declared." (ibidem, note). Finally, in *Pollard against Evans and Others* (1680), it was raised in arrest of judgment that "it appears the declaration is false; for a conspiracy cannot be in or by one, but between two at the least." The court resolved that "in a writ of conspiracy it is true, but in an action of the case it is otherwise; and though this be like the other, yet it is not the same."[1002] In sum, as March put it "if two falsly and malitiously conspire to indict another, and after hee that is so indicted, is acquitted, a Writ of conspiracy lyes. So if one only falsly and malitiously cause another to bee indicted, who is therupon acquitted, an action upon the case in nature of a conspiracy."[1003]

Given this connection with the writ of conspiracy from which the new action on the case seemed to be derived, it was all but logical that lawyers and judges thought that maybe that pesky acquittal requirement of the writ was the other formal difference that distinguished writ from action. Or to put it in other words, it might also be the case that this new remedy fixed that problem allowing a tighter control of prosecution. All in all, there were now more ways to screen prosecutors.

In any event, we find traces of this idea that the action on the case derives from the writ by suppressing the acquittal requirement in the case-law. The issue as to whether the acquittal of the party was necessary for this action to lie was long debated. Here there were

[999] 2 Keb 476, 84 ER 298. "As to the third exception, the Court said it was an action [230] on the case, and therefore the plaintiff shall have judgment against the defendant whom the verdict is found against, although the two other defendants are acquitted," 1 Wms. Saund. 230, 85 ER 251.

[1000] 2 Keb 497, 84 ER 312.

[1001] 1 Wms Saund 228, 230; 85 ER 249, 251.

[1002] 2 Show KB 51, 89 ER 786.

[1003] John March, *Actions for Slaunder* (London: Printed by F.L. for M. Walbank and R. Best, 1647), 129-30.

two main options: either to make it necessary or to consider that the action on the case was indeed a solution to that problem of the writ, or to come up with a different rationale altogether as will be seen later.

At first, courts seemed reluctant to depart from the form of the writ other than in the plurality requirement. In *Lovet v Faulkner* (1614), Coke CJ, commenting on *Knight v Germin*, said that it was "the first case here now brought, of this nature, ad generalem gaolao deliberationem, if it be not expressed in the declaration, quod legitimo modo acquietatus, no writ of conspiracy, nor yet any action upon the case lyeth."[1004] In *Cranbancks Case* (1618), Doddrige said in an obiter that "que home poet aver action sur le case sur faux conspiracy d'indicter home coment que il ne soit acquitted, mes conspiracy ne gist, si non que il soit indicted & acquitted."[1005] In *Wright vs Black and Black* (1620), it was moved in arrest of judgment that the action did not lie "because the indictment was not found." The counsellor for the plaintiff replied that "the plantiff here may not have a writ of conspiracy, for the indictment was not found, but yet if we should admit that he may have a writ of conspiracy, yet he may as this case is have an action upon the case at his election," implying that the action lied without acquittal where the writ did not.[1006] In *Smith v Cranshaw* (1622), the Chief Justice laid that "conspiracy ne gist, si home ne soit legittimo mode acquietatus, issint quo il doit estre indict, & auxi acquitte, mes action sur le case gist coment que il fuit indict."[1007] Yet Doddrige again disagreed, for when "le indictee nest acquitt per verdict, mes le jury trove ignoramus issint que il est subject still al auter indictment."[1008] Likewise, Houghton J said that "que action ne gist, quia est trove un ignoram[us] solem[en]t, q[ue] ne acquit le pl[ein]t[if]… mes est lyable a ceo, p[ur] q[ue] intant q[ue]n'est acquit de ceo, n'avera action."[1009] However, when the case was revived, the Court laid that "Et touts disont que sont 2 briefs ou actions pur conspiracy, l'un le brief de conspiracy enserte en le register, & l'auter

[1004] 2 Bulst 270, 271; 80 ER 1114, 1115.

[1005] 2 Rolle 50; 81 ER 652.

[1006] Winch 28, 124 ER 24.

[1007] 2 Rolle 259, 81 ER 786.

[1008] 2 Rolle 260, 81 ER 785; "si le p[ar]ty no soet acquit del crime, come n'est icy sur le ignoram[us], Ia ne gist, & le jury in ceo action ne luy acquit del treason, mes solem[en]t trove un malicio[us] p[ro]secution, per q[ue] action ne gist," Palm 315, 316; 81 ER 1100, 1101.

[1009] Palm 315, 316; 81 ER 1100, 1101.

est un action sur le case, & si home port brief de conspiracy mention en le register il doit estre indicte & acquitte, & si ne soit acquitte null action gist… sed si home port action sur le case il est sufficient coment que null acquitall."[1010] In *Skinner vs Gunton, Lyon, and Leason* (1670), it was argued in arrest of judgment that "it was not alleged by the plaintiff in his declaration, that the plaint levied in the compter was determined either by nonsuit, or by discontinuance, or verdict against the plaintiff there; for otherwise the plaintiff hath commenced his action too soon. As in an action upon the case, or conspiracy, for falsely indicting one of felony, the plaintiff should shew that he was acquitted of the indictment before he can bring his action."[1011] The Court laid "that perhaps it might have been material upon a demurrer… [but after verdict] now it may be intended that the plaint was determined; but they did not regard whether it was determined or not; for if the defendant would have had advantage thereof, he ought to shew it, but he has passed it over by his plea of not guilty."[1012] In *Pollard against Evans and Others* (1680), it was laid that "in a writ of conspiracy, it must be alledged that the party was legitimo modo acquietatus inde, and shew that it was a fair acquittal. But this action will lie for such a malicious prosecution where the jury find an ignoramus."[1013]

Another formal distinction that could be made to explain the action on the case as an offshoot of the writ of conspiracy was the nature of the indictment. Thus, in *Skinner v Gunton and Lyon* (1670), it was said that "albeit the writs of conspiracy and this action by bill be the same in form, yet when this is but on a trespass it's action sur case."[1014]

Likewise, the remedy given was another way of formally distinguishing the writ of conspiracy from the action on the case in the nature of conspiracy. In *Cranbacks Case* (1618)

[1010] *Smith v Cranshaw & Alios* (1625) Jones W 93, 83 ER 49-50; "si un home soit endite de felony fauxment, conspiracy gist apres acquittal, & un action sur le case en nature de conspiracy apr[es] ignoramus trove." *Smith v Crashaw* (1625): Latch 79; 82 ER 284; "acc[i]on de conspiracy ne g[is]t sinon q[ue] le p[ar]ty soit legittimo modo acquietatus. Mes acc[i]on snr [sur] le case g[is]t s[an]s ceo," Smith v Crashaw (1625) Benl 152, 73 ER 1019.

[1011] 1 Wms. Saund. 228-9; 85 ER 249-250.

[1012] 1 Wms Saund 228, 229; 85 ER 249, 251.

[1013] 2 Show KB 50-51; 89 ER 786.

[1014] 2 Keble 476, 84 ER 298; "and according to the offence, if felony, conspiracy; if but trespass, action sur case," 2 Keble 497, 84 ER 312.

it was noted that "le judgement sur action del' conspiracy est villanous judgement, & icy le plaintiff est lie in action sur le case come appiert per le bill, & sur ceo il avera judgemen."[1015]

Another way to look at this action was to think that it derived from defamation, and that therefore it was an action for damages as consequence of a false imputation of an offence. In *Pescod v Marcham* (1607), it was explicitly laid by the court that "it is good without saying, legitimo modo acquietatus, in an action upon the case, which lies as well before as after the acquital, for the infamie by the indictment."[1016] In *Wright vs Black and Black* (1620), Hobert CJ argued that "it is as great a slander to preferre a bill of indictment to the grand jury, and to give this in evidence to them, as it is to declare that in an ale house… and the indictment in writing, and the preferring that to the grand jury containes the scandal: and I am of opinion that an action upon the case lyes well."[1017] The conflict between the two views of the action arose in *Manning and his Wife v Fitzherbert* (1633), where it was objected that the action could not lie because it "join actions for words and in nature of a conspiracy together." The Court in fact tended to interpret it as an action for words where the other allegations were "not in nature of a conspiracy, but an aggravation of the false and malicious accusation."[1018] This latter case shows how the view that this was an action for damages, provided that the intention and the absence of a reasonable cause of prosecution was proved, would explain why this action began to be called *malicious prosecution* [1019]The name that would become in the end the name of this form of action.

Indeed, the view that this was an action for damages as a consequence of words imputing an offence ultimately carried the day. The idea became fixed as Holt attempted to draw a theory on the rationale of this action based on a substantive analysis rather than a mere formal comparison between actions in *Savile v Roberts* (1698). The central idea was that "that this action is not grounded upon the conspiracy, but upon the damage, and therefore

[1015] 2 Rolle 50, 81 ER 652.

[1016] Noy 117, 74 ER 1081.

[1017] Winch 28, 29; 124 ER 24, 25.

[1018] Cro Car 271; 79 ER 836.

[1019] *John Vanderbergh and James Vanderbergh v George Blake* (1661) Hadre 194, 197; 145 ER 447; 449; *Pollard against Evans and Others* (1680) 2 Show KB 51, 89 ER 786.

the plaintiff must prove his damages, otherwise the action will not lie."[1020] He then proceeded to sketch a tripartite classification of the types of damages that supported the action: "the damage to a man's fame, as if the matter whereof he is accused be scandalous… such as are done to the person as where a man is put in danger to lose his life, or limb, or liberty… [and] damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused."[1021]

With this classification, Holt was not only providing a rationale for this action on the case, but also a general category of action for damages as a consequence of prosecution, which embraced both the writ of conspiracy and this action. The writ was conceived as an action grounded on the damages to the person. In other words, this allowed for a substantive distinction between the writ and action forms in that the former "lies only for procuring a man to be indicted of treason or felony, where life was in danger." This meant the action on the case was not conceived as deriving from the writ, but rather both as deriving from a common foundation.[1022]

Holt's classification was confirmed, and his analysis in terms of damages by Parker CJ in *Jones v Gwynn* (1714). There, indeed, Parker rejected this analogy between action and writ for

> There is no arguing from one sort of action to the other. —Actions of conspiracy are the worst sort of actions in the world to be argued from; for there is more contrariety and repugnancy of opinions in them than in any other species of actions whatever… [writ of] Conspiracy lies not without acquittal; and the reason of this, and the only one, is, because this is a formed action, and the form of the writ in the register is so… There is certainly no arguing from an action which is a formed one, for which there is a formal writ in the register, to an action upon the case, that is died down to no form at all.[1023]

Thus, in Parker's view, the action on the case was completely independent from the writ. It did not make sense to continue to reason as if it were like the writ in

[1020] *Savile v Roberts* (1699): 3 Salked 16; 91 ER 664.

[1021] 1 Ld Raym 374, 378; 91 ER 1148, 1149-50.

[1022] However, at the same time, Holt mustered Fitzherbert's formal argument that writ and action "are founded upon one common foundation, but the number of the parties defendants determines it to the one or to the other, "1 Ld Raym 374, 379; 91 ER 1148, 1150.

[1023] 10 Mod 214, 218-9; 91 ER 699. 701.

all but some elements. Besides, as Holt had laid down, both belonged to the same type of actions for damages as a consequence of prosecution. [1024]

This view that writ and action were remedies deriving from the same substantive foundation, as a consequence of the blend in this action, can be seen much earlier. As seen, under this view, the writ of conspiracy becomes an action that remedies the imprisonment and/or compensates the risk to life that they had undergone. This view of the prosecution as putting at risk the life and the writ as a remedy transpires from other cases.[1025]

In keeping with this idea, it should be noted that the development of this action on the case changed the way scholars thought about the writ of conspiracy. It was now framed as an action for harm because of the imputation of an offence limited to prosecutors who could not justify their imputations. Thus, though neither Staunford nor Coke mentioned the action on the case in their treatises, the influence is manifest. Staunford integrated the lack of justification in his definition of the form of the writ of conspiracy, so that "cestuy qui serra charge in conspiracy, duist estre charge que il ceo fist faulxement & maliciousement sans ascun bon foundacion."[1026] Likewise, Coke held that "in a writ of conspiracy… [one] should recover damages for satisfaction in regard of the infamy, imprisonment, and vexation done."[1027] And in explaining the punishment of conspirators by criminal procedure he says that one of the reasons for instituting the villainous judgment was that the prosecution involved perjury and was "under pretence of justice and by course of law, which was

[1024] Despite this view, as late as 1766, lawyers were still drawing analogies with the writ of conspiracy. Thus, in *Farmer v Darling* (1766), it was said that in the action on the case "as in a writ of conspiracy, falsity is necessary to be charged," 4 Burr 1972, 98 ER 27. This is consistent with Holt's view of the action on the case as action for consequential damages by contrast to trespass as action for direct damage

[1025] For instance, Saunders believed that "conspiracy lies for divers other matters than for false or malicious indictments, where the life of a person is put in jeopardy." *Skinner vs Gunton, Lyon, and Leason* (1670): 1 Wms. Saund. 228, 229; 85 ER 249, 250. Cf. with the substantive analysis of the defendant's counselor in *John Vanderbergh and James Vanderbergh* (1661), who argued that "it is a rule in law, to which all the books agree, that an action upon the case or an action of conspiracy lies for a false and malicious prosecution, upon which the plaintiff is acquitted or ignoramus found; and the reason is because now it appears there was no cause for it: the party that was molested being now by judgment of the court or other due proceedings of law acquitted or discharged ; and therefore the law allows him recompence for such unjust vexation," Hadre 194, 196; 145 ER 447, 449.

[1026] Staunford PC Liber 3 173 E

[1027] 2 Inst 381.

instituted for the protection and defense of the innocent."[1028] Furthermore, the idea that what distinguished the writ from other actions is that it compensated the risk the plaintiff underwent can be seen in that the writ of conspiracy was now described as an action in cases "concerning life,"[1029] because if the accusers "had attainted the innocent, he should have lost his life… his lands, his goods, and his posterity."[1030]

[1028] 3 Inst 143.

[1029] 2 Inst 561.

[1030] 3 Inst 143.

5. The Rearrangement of the Law of Conspiracy

5.1 Conspiracy in the Court of Star Chamber

The development of this new form of action was not only the result of the common law litigation. As we will see, the Court of Star Chamber also played an important role as it opened its own forum to the same kind of complaints that were reaching the common law courts, offering its own remedy against failed prosecutions. When it came to framing these cases, the same analogies mapped these complaints, and the same kinds of arguments were raised to defeat or bolster them.

However, before even engaging in these issues, actions had to overcome the threshold of the Court, and for that some watchwords were necessary. Determining the Star Chamber's jurisdiction over these cases was peremptory. And this was not a minor issue that lawyers had to raise in court, for there was a long tradition of dealing with prosecutors in the common law courts through the writ and the indictment of conspiracy. There were two approaches as to how the Star Chamber could offer a remedy for failed prosecutions. It could, for instance, assume that it had cognizance of ordinary cases of conspiracy, and then go on to extend this jurisdiction to new cases such as failed or individual prosecutions. As we will see, this path would lead to frame these new facts either as a special case of the writ of conspiracy or as leading to an action for consequential damages to an innocent's reputation.[1031] However, it could also frame these cases so that their facts amounted to offenses known to be within the purview of the Star Chamber, such as subornation of perjury, forgery, or inchoative crimes. The result of this second alternative would mean a deep change in the structure of conspiracy, as one of its peripheral forms would end up structuring the whole category.

5.1.1 Analogy with the Writ of Conspiracy

As mentioned above, it seems that, at least for some authors, the Court of Star Chamber assumed that the jurisdiction over cases of what would amount to an action on the case derived from its jurisdiction over cases of conspiracy. From that point of view, the misdemeanor the court punished was modelled in purely formal terms as a special case of conspiracy, distinguished from the form of conspiracy in the variation of certain

[1031] In turn, this blended space would consolidate as a new form of action.

requirements. There is no better example of this opinion than Hudson's description of the court's jurisdiction over "conspiracy and false accusation." Indeed, the use of these two expressions seems to designate the classical view of conspiracy as encoded in the writ of conspiracy, and the variations of the action of the case.

Regarding the issue of jurisdiction, Hudson notes that in *Rochester v Solm* (1600), Coke believed "after his acquittal he was to prefer his indictment at the common law, where conspirators were to have their villaines judged."[1032] He thus implied that no suit could be brought to the Star Chamber for conspiracy. However, Egerton affirmed the jurisdiction of the Star Chamber over cases of conspiracy "manifesting that notwithstanding the party might have his indictment, yet that excludeth not the court of jurisdiction."[1033] And, although Egerton's opinion was expressed in a relatively recent case, Hudson argued that this jurisdiction was exercised as early as the reign of Henry VIII, with several cases to prove it.[1034] He then added that, though "this court hath jurisdiction in all cases of conspiracy where the common law hath any… [it also has jurisdiction] in divers cases further than the common law."[1035] These were cases in "which there appears no indictment or acquittal," and where "one man falsely accuse [sic] another."[1036] That is, they are the same type of cases that would develop the frame of the action on the case of conspiracy as an action devised to overcome the acquittal and plurality requirement.

I will turn now to those elements of the blended space that are the result of the mapping of the form of action of the writ onto the facts. It should be recalled that, as this blended space tended to include facts that not only did not match the writ, but were inconsistent with it, in time, courts began to think of this blend not as within the periphery of the writ of conspiracy but as a category of actions itself, an action on the case. And it should

[1032] Hudson TSC, 204.

[1033] Hudson TSC, 104.

[1034] Hudson TSC 106. See also the Tudor cases cited in 9 Co Rep 57a, 73 ER 815; and in Moore (KB) 817, 77 ER 924. Since the punishment of the criminal conspiracy involved forfeiture of land, one may wonder whether extending the jurisdiction of the Star Chamber to this offence did not violate its jurisdictional limitations to misdemeanors, HLC 564.

[1035] Hudson TSC 106.

[1036] Ib.

be also mentioned that this would be a double scope blend.[1037] As we will see later, some of the facts of the base space will be projected onto the blend and then mapped onto different frames.

I will show next how the facts of the cases that came before the Star Chamber were mapped onto the frame of the writ of conspiracy, and how the blended space resulting from these projections allowed lawyers to draw inferences as to the cases they were arguing about.

The previous agreement of the formula of the writ appears among the facts declared in several cases before the Star Chamber. In *Remington & al. v Allen & al. Pasc*. (1625), the defendants "by Conspiracy met together, and procur'd an Indictment of Barratry against the Plaintiffs."[1038] In *Bacon v Boulton & al* (1631), the defendants "by like Conspiracy and Agreement… preferred… an Indictment."[1039]

However, the previous agreement does not seem to imply the doctrine developed by the courts that there had to be at least two defendants for the action to stand. As has been mentioned in passing, paralleling the contemporary development of the action on the case in the nature of conspiracy, Hudson says that at the Star Chamber, suits could be brought against a sole defendant. Indeed, there are several cases brought against a sole defendant, but the issue as to the plurality requirement was never raised by them.[1040]

As in the action on the case, wrongful prosecution mostly meant complaining before a JP and being detained and bound to appear before court as a consequence of it. In the *Poulterers' Case* (1610), the defendant complained of having been "apprehended, examined, and bound to appear at the assises in Essex."[1041] In *Monk v Blackburn & al.*, the defendants

[1037] Fauconnier and Turner, *Think*,131-5

[1038] SCR 1-4.

[1039] SCR 28-34.

[1040] See the cases cited in Hudson TSC 104-106, Moore (KB) 816, 817, 77 ER 924 and 9 Co Rep 55b, 57a; 73 ER 813, 815 another case against a sole defendant is *Floyd v Barker* (1608) 12 Co Rep 23, 77 ER 1305. Interestingly enough, *Robert Scarlet's Case* (1612) 12 Co Rep 98, 77 ER 1373 resembled the early writs of conspiracy's allegations of corruption as there was a sole defendant who was said to have been "by confederacy betwixt him and the clerk, procured himself to be sworn of the said grand inquest."

[1041] 9 Co Rep. 55b, 73 ER 813.

fabricated evidence that led to a warrant, the examination and the imprisonment of the plaintiff.[1042]

The wrongful prosecution was framed as procured. It should be recalled that the term *procurement* could be used to evoke several different frames inheriting from the meaning to cause someone to do something. Indeed, these frames appear sometimes evoked by the term *procurement*, sometimes by other terms. The main consequence thus is that the wrongful prosecution is always presented as something that the defendants procure or cause to be by their agreement. This way of framing the wrongful prosecution also appears in the actions brought before the Star Chamber. In the *Poulterers' Case* (1611), it appears as misleading or deceiving a public officer or a jury into doing something unlawful by crafting a false accusation, so the defendants were said to have intended "to procure him to be indicted, arraigned, adjudged, and hanged," and they "procured divers warrants of justices of peace."[1043] In *Remington & Al. v Allen & al.* (1625), the defendants were alleged to have "procur'd and Indictment of Barratry against the Plaintiffs."[1044] In *Tyler v Towlin & al.*, the defendants "procured a Warrant for him from a Justice of Peace," and after the accuser retracted, again "they procured another Warrant against him, and got him bound over to answer it at the Assizes, where they procured a Bill of Indictment to be preferred against him."[1045]

Procurement could also mean corruption or abetment of another person. The subornation of witnesses not only was in analogy of the writ of conspiracy, but also brought the case within the jurisdiction of the Star Chamber as this court was responsible for the punishment of the subornation of witnesses. In *Anthony Ashley's Case* (1611), the defendants were said to have been suborned by another defendant to accuse the plaintiff of murder "and that he should procure witnesses to convict the plaintiff of murder." In *Phips Cler. v Eyres & al.* [1046](1631), the defendants were said to have, "by Persuasions, Promises of Reward, and

[1042] SCR 28-34.

[1043] 9 Co Rep 55b, 73 ER 813.

[1044] SCR 1-4.

[1045] SCR 15-20.

[1046] 12 Co Rep 90, 91, 77 ER 1366, 1367.

Solicitations, … procured… [the defendants] to consent, to accuse the Plaintiff of a Rape."[1047] In *Lord Wentworth, Lord Deputy of Ireland, against the Lord Mountnorris, Sir Pierce Crosby and others* (1639), the defendant was said to have "stirred up… [one of the defendants] to prosecute [the plaintiff]" and offered her money to maintain the suit.[1048] Corruption is not explicitly mentioned but implied in *Robert Scarlet's Case* (1612), where the defendant was said to have "procured himself to be sworn of the… grand inquest."[1049] In *Monk v Blackburn & al.* (1632), there rather was abetment, as one of the defendants was said to have "procured the other Defendants to insert treasonable words [in some intercepted letters], and scandalous matter against the Lord *Gray* and cunningly drop'd one of those Letters in a Market-Town, so as it might come to her hands again, and then carried them to the said Lord *Gray*."[1050]

Some cases in the Star Chamber included the allegation of the previous acquittal of the plaintiff.[1051] Other cases were brought where there was no acquittal alleged.[1052] The issue as to whether the previous acquittal was a requisite to bring a suit for conspiracy before the Star Chamber was raised several times, revealing the analogy with the writ. Thus, in *Sydenham against Keilaway* (1574), where the question had been raised, Popham J. conceded that "where two conspire to indict one falsely, and the party is not indicted, because the jury had not sufficient evidence, but returned an ignoramus upon the bill, no conspiracy lies, because he never was indicted nor acquitted," and tried to argue against it.[1053] Likewise, the objection was raised in the *Poulterers' Case* (1611) that "no writ of conspiracy for the party grieved, or indictment or other suit for the King lies, but where the party grieved is indicted,

[1047] SCR 20-28.

[1048] HC 885-946.

[1049] 12 Co Rep 98, 77 ER 1373.

[1050] SCR 28-34.

[1051] *Muck's Case*, *Hamersley v Shappard* cit. in Moore (KB) 817; *Rochester v Solm* (1600) Hudson TSC 104,105; *Remington & al. versus Allen & al.* (1625) SCR 1-4; *Tayler versus Tolwyn & al.* (1628) SCR 15-20, *Bacon ver. Boulton & al.* (1631) SCR 28-34.

[1052] *Cuther Laughton vs Palin and Blackwell* (1516) cit. in Hudson TSC 106; *Constance v John Young* (1527) ib.; *Beverly versus Power & al. Pasc*. (1625) SCR 1-4.

[1053] Cro Jac 8, 79 ER 7.

and legitimo modo,"[1054] and in *Sir Anthony Ashley's Case* (1611) "by the law, conspiracy lies when a man is indicted, and legitimo modo acquietatus: but here he was never indicted."[1055] We will see later how the Court of Star Chamber got around this objection by mapping these facts onto a different frame, thus changing the structure of the offence of conspiracy.

5.1.2 Analogy with Defamation

Another way to bring failed prosecutions or prosecutions of lesser offences within the purview of the Star Chamber was to frame them as cases of slander.[1056] In his treatise, Hudson explained that cases in which "life was not in jeopardy" because the indictment was insufficient or because the accusation was of trespass, a suit lies at the Star Chamber because "that tendenth to the utter ruin of a man's reputation, which is as carefully preserved in this court as life itself."[1057]

There is some evidence of this way of framing the case in several cases. For one thing, failed prosecutions were cases of imputations out of court clearly within slander, and in *Lee Case* it seems that there was a false spreading of rumors with no bringing of charges.[1058] Some cases, like *Dr. Peterson Deacon of Exeter v Travers Cler. & al Michael* (1632) SCR 4-53, were based on a conspiracy to accuse the plaintiff of an ecclesiastical offence. Sometimes defamation was mentioned by name, as in *Beverly versus Power & al. Pasc.* (1625) SCR 1-4 a deserted false prosecution was punished by the Star Chamber as a "meer Libel and Scandal."

The high-profile case of *Lord Wentworth, Lord Deputy of Ireland, against the Lord Mountnorris, Sir Pierce Crosby and others* (1639) HC 885-946, on the verge of civil war, further illustrates not only the connection between slander, but also how conspiracy could be used to frame a false accusation as a form of attempt of homicide.[1059] The defendants were

[1054] 9 Co Rep 55b, 56a; 73 ER 813.

[1055] 12 Co Rep 90, 92; 77 ER 1366, 1368.

[1056] For a discussion of the jurisdiction of the Star Chamber over defamation see 8 HEL 333-338; 5 HEL 208-212.

[1057] Hudson TSC, 106-107.

[1058] Hudson TSC 106.

[1059] For more see later.

charged “for raising and divulging Scandals of the Lord Deputy of *Ireland*, giving out as if he was guilty of the death of one *Esmond*, proceeding from Sir *Pierce Crosby's* malice, who drew unto his Confederacy the other Defendents; who all repining at the Lord Deputy, resolv'd generally to make use of the death of one *Esmond* a sick and infirm man.” They were additionally accused of having approached Esmond’s wife and **“**got her into their Confederacy, and tell her, The Complaints will be well received in *England*, offering her 1000 *l.* to come over.”

Summing up, Pierce Crosby had been charged firstly of plotting with others that they would have Esmond’s wife come to England to complain that on being charged with contempt for refusing to take aboard the King’s timber, Esmond was brought before Lord Wentworth, and that the latter struck him with a cane with such intensity that Esmond would had died some time later as a consequence of the wounds. Secondly, Crosby was charged of spreading the rumor that this had happened and that a complaint was being made.

After examining the evidence, the court had a diversity of opinions as to the grounds on which to punish the defendants. Lord Cottington’s held that “*Pierce Crosby* endeavour'd to draw this scandalous Accusation upon this Lord, and hath bin a Publisher of it,” and the many of the other defendants “guilty of spreading this Scandal.” Lord Chief Justice Finch thought it to be “a Conspiracy to raise a Scandal, to bring my Lord Deputy in question, both in his Honour, Life, and Fortune,” however, considering that there was “a single Testimony in the main point for the Conspiracy,” he could not bring himself to “condemn any of them of a Conspiracy, or of a Practice with others, to raise this Scandal *ab origine*, *to bring my Lord Deputy in danger of his Life*.” But he thought there was sufficient proof of the slander. Sir Thomas Jermain saw no plot and only slander, which was “the greater, because it was against a great man.” Juxton, Bishop of London and Lord Treasurer found the slander and that Pierce Crosby “is a great Delinquent, if not a Plotter; Yet a subtil, industrious and diligent Labourer in the Prosecution. If it took no effect, it was no Fault of his.” Lord Archbishop of Canterbury believed that Lord Wentworth had done the right thing in bringing the matter to the Star Chamber because “the Report was spread so far and so high, that if it had bin suffered [sic] to have lain asleep, it might have endangered my Lord Deputy, and his Posterity after him,” and that this way “the Innocency of my Lord Deputy might the more clearly appear”

(the clearing function of defamation should be recalled here). He found "the Defendents… guilty of a grievous, malicious, and dangerous Scandal; and whether true or false it is no matter, for it stands against the Foundation of all Law, that if the thing were true, yet they are scandalous Reports." And added that "if such a thing shall go unpunish'd, or with a light Punishment, no man in his Place can live in Safety of his Life, Honour, and Fortune." Lord Keeper concurred with Lord Archbishop of Canterbury that "it was necessary for him in the point of his Honour, for I am very confident, that had he not taken that way, this Rumour and Calumny had spread so far, that of necessity it would have required him at last for his Safety to do this." And he found the slander.

But perhaps the best evidence of the analogy with action defamation as well as ecclesiastical defamation was the use of repentance as one of the wide range of remedies and punishments with which this court visited those convicted of conspiracy.[1060] As in ecclesiastical defamation, the court sometimes bound defendants to show repentance in public places. In *Tayler v Tolwyn & al.* (1628) SCR 15-20, some defendants were bound "to acknowledge their Offences, and ask the Plaintiff forgiveness at the Assizes." In *Phips Cler. v Eyres & al. Hil.* (1631) SCR 20-28, they were bound "to acknowledge their Offence, and ask the Plaintiff forgiveness in his Parish-Church." In *Dr. Peterson Deacon of Exeter v Travers Cler. & al Michael*. 8 Car. (1632) SCR 44-53, the defendants were sentenced to the pillory and "there to make an acknowledgment, and ask the Plaintiff forgiveness." Furthermore, the court continued the practice in cases of defamation of giving damages in addition to punishment.[1061]

5.1.3 Unjustified Prosecution

While establishing its jurisdiction over failed prosecutions, the court of Star Chamber jurisdiction also discussed the issue as to when prosecutors were justified in bringing charges and free from liability from any wrong they might have caused to the other party. This further illustrates the connection between the development of conspiracy in the Star Chamber and

[1060] On the extrajudicial power of this ritual of public repentance, which could even be negotiated extrajudicially, see *the Poulterers Case* below.

[1061] See *Beverly versus Power & al. Pasc*. (1625) SCR 1-4; *Monk versus Blackburn & al.; Conspiracy to accuse the Plaintiff of Treason. Hill*. 6 Car. (1632) SCR 28-34; *Dr. Peterson Deacon of Exeter versus Travers Cler. & al Michael*. (1632) SCR 44-53; *Lord Wentworth's Case* (1639) HC 885-946.

that parallel of the action on the case in the nature of conspiracy in common law courts. We shall see how justification appeared in the cases brought.

The allegation that prosecutor acted upon malice and without reasonable cause is a constant in the Star Chamber cases. In *Palin and Blackenball Case* (1516) Hudson TSC 106, the defendants were sentenced for they did "maliciously and without cause reasonable" accuse the defendant. In *Sir Anthony Ashley's Case* (1611) 12 Co Rep 90, 77 ER 1366 the motives of the defendant for procuring the false indictment of the plaintiff were duly explained in that there was a previous land dispute between them in which the defendant had not been able to prevail. As the conspiracy moved forwards by means of a petition to the King, it was certified that there was a "false conspiracy to indict Sir Anthony without any just ground. The false juror *in Robert Scarlet's Case* (1612) 12 Co Rep 98, 77 ER 1373 was charged with procuring "himself to be sworn of the said grand inquest, with intent to indict his neighbours maliciously… upon his own knowledge." In *Remington & al. v Allen & al.* (1625) SCR 1-4, the plaintiff argued? that the defendants "out of malice to the Plaintiffs, and by Conspiracy met together, and procur'd an Indictment of Barratry against the Plaintiffs." In *Bacon v Boulton & al.* (1631) SCR 28-34, the defendants were said to have "out of Malice to the Plaintiff… conspire[d] together to accuse and indict him for supposed stealing of several petty thing." In *Phips Cler. v Eyres & al. Hil*. (1631) SCR 20-28, the charge was that "out of Malice to the Plaintiff, for that he had caused one *Jemmet*, an uncomfortable Minister, to be put from being Lecturer of their Parish, raised a same {alike}, that the Plaintiff had ravished, or attempted to ravish a Woman of *Sandford*, where the Plaintiff had formerly dwelt." In *Monk v Blackburn & al.* (1632) SCR 28-34, the defendant "out of malice to the Plaintiff, for that he had caused her Husband to be arrested for Debt" procured the fabrication of certain evidence against him. In *Dr. Peterson Deacon of Exeter v Travers Cler. & al.* (1632) SCR 44-53, the defendant Travers "upon some heart-burning and discontent taken against the Plaintiff for crossing his Advancement to the Place of a Canon-Residentiary in the Church of *Exeter*, did conspire with the Defendant *Frost*, and *Katharine Bampton*, his Daughter, falsely and maliciously to accuse the Plaintiff with the foul {false} Crime of Incontinency with her the said *Katharine*."

The issue as to whether prosecutors ought to be justified on the grounds that they had acted upon reasonable suspicion and therefore without malice, lest they be discouraged against the principle that crime must not go unpunished, was also discussed in the Star Chamber.

In *Rochester vs Solm* (1600) Hudson TSC 104-5, Solm had accused along with others Rochester of having struck his father to death on the grounds that the latter had so confessed at his deathbed. This was held as a good justification. The court argued that "it is no ground to say [that] the jury acquitted him, and therefore your indictment was false, for many times great offenders escape upon indictments." Furthermore, "perhaps the prosecution is not without malice (for the truth may be accompanied with malice)." Moreover, the court concluded that if actions were allowed against his indictors, "then I know not but every acquitted delinquent may bring his writ of conspiracy."

Likewise, the defendant in the *Poulterers' Case* (1611) objected that:

> Every one who knows himself guilty, may to cover their offences, and to terrify or discourage those who would prosecute the cause against them, surmise a confederacy, combination, or agreement betwixt them, and by such means notorious offenders will escape unpunished, or at the least, justice will be in danger of being perverted, and great offences smothered.[1062]

In *Sir Anthony Ashley's Case* (1611), the defendant objected that:

> the bill upon the said conspiracy did not lie, and that it should be dangerous to maintain it; for if it should be lawful for every one who is accused, or was in fear to be accused of any capital crime, to exhibit his bill in this Court against the accuser and all the witnesses, and by many captious and intricate interrogatories severally to examine them, to find contrariety in them incircumstances [sic]; this will deter men to prosecute against great offenders, and thence great offences will pass unpunished, which will be dangerous to the weal public.[1063]

In *Tailor and Towlin's Case* (1628) Godb 444; 78 ER 261, Hyde C.J. held that "upon probable proof a man might accuse another before any justice of peace, of an offence; and although his accusation be false, yet the accuser shall not be punished for it. But where the

[1062] 9 Co Rep 55b, 56a; 73 ER 813, 814.

[1063] 12 Co Rep 90, 91; 77 ER 1366, 1367-8.

accusation is malitious and false, it is otherwise; and for such accusation he shall be punished in this Court."

In *Sir Anthony Ashley's Case*, the Star Chamber also laid down what the grounds were for someone to arrest a suspect so as to bring him to justice:

> 1. That a felony be done… 2. That he who doth arrest hath suspicion upon probable cause, which may be pleaded, and is traversable…3. That he himself, who hath the suspicion, arrest the party. For he cannot command another to do it, for suspicion is a thing individual and personal, and cannot extend to another person than to him who hath it.
>
> As to what amounted to reasonable suspicion, it was said that:
>
> if felony be done, and one hath suspicion upon probable matter that another is guilty of it, because that he had part of the goods robbed, and is indigent, or if the party be indicted, or if murder be committed, and one is seen near the place, or coming with a sword or other weapon embrued with blood, or that he was in company of felons, or hath carried the goods stolen to obscure places, or such like things, these are good causes of suspicion.[1064]
>
> Likewise, "if felony be done, and the common fame and voice is that one hath committed it, this is good cause for him who knows of it to arrest the party, to the intent that he may be brought to justice."[1065]

The question as to whether juries, court officers and judges had immunity from the action of conspiracy was finally settled in the Star Chamber in the landmark decision of *Floyd v Barker* (1608) 12 Co Rep 23, 77 ER 1305. The essence of the court's argument in upholding this immunity of legal agencies was based on the protection of the oath these agencies took. It should be recalled that in the discussion of the medieval conspiracy we saw several examples of the oaths given to jurors, justices, and sheriffs. The formula of these oaths more or less repeated the idea that the person taking them would not depart from justice for gain, hatred, fear or love, and would do his duty accordingly. This meant that the law would presume that they acted this way when they were in court, that is, after they had taken the oath. Otherwise, it would be perjury and for this there was a different procedure.

[1064] 12 Co Rep 90, 92; 77 ER 1366, 1368.

[1065] Ib.

Furthermore, after they had taken their oaths, they were supposed to act under the compulsion of the law.

Thus, since indicting jurors "are returned by the sheriff by process of law to make inquiry of offences upon their oath, and it is for the service of the King and the commonwealth… they shall not be impeached, for any conspiracy or practice, before the indictment: for the law will not suppose any unindifferent [sic,] when he is sworn to serve the King."[1066] A witness, on the other hand, "if he conspire [sic] out of the Court, and after swear in the Court, his oath shall not excuse his conspiracy before; for he is a private person, produced by the party, and not returned by the sheriff, who is an officer sworn."[1067]As for judges, "be he Judge of Assise, or a justice of peace, or any other Judge, being Judge by commission and of record, and sworn to do justice, cannot be charged for conspiracy, for that which he did openly in Court as Judge or justice of peace: and the law will not admit any proof against this vehement and voilent [sic] presumption of law, that a justice sworn to do justice will do injustice." This extended to JPs' pretrial proceedings: "due examination of causes out of Court, and inquiring by testimony, et similia, is not any conspiracy, for this he ought to do." However, JPs have no immunity for any other conduct that is not part of his purview such as "subornation of witnesses, and false and malicious prosecutions, out of Court, to such whom he knows will be indictors, to find any guilty, &c. amounts to an unlawful conspiracy."[1068]

5.1.4 Disturbance of Private Right

There were also instances of the use of *conspiracy* as agreement to support each other in disturbance of private right. In *Scrogs v Peck and Gray* (1599) Moore (KB) 563, 72 ER 760, there was a prior land dispute between Peck and Gray. Peck claimed a lease in reversion from Gray, and Gray claimed the rent to commence at the same time as the lease. Scrogs complained that "Peck & Gray conspire q[e] Gray exhibite un bill en Chancery vers Peck supposant que il ad le lease en rev[er]c[i]on, & combine ove Scrogs d[']obscure ceo & p[re]nder aut[er] lease pur defeat le rent. Sur que ils agreo[n]t de faire p[ur]ose per

[1066] 12 Co Rep 23, 77 ER 1305-6.

[1067] 12 Co Rep 23, 77 ER 1305, 1306.

[1068] 12 Co Rep 23, 24; 77 ER 1305, 1307.

testimoignes del lease en rev[er]c[i]on, et del rent sans vocant Scrogs a ceo." The Star Chamber fined them because "le matter dagreem[en]t [est] en p[er]judice d[']un terce p[er]son sans son privity."

In *Lord Seignior Greyes Case* (1608) Moore 788, 74 ER 907, the tenants of the Manor of Broughton Aston, Leicester, agreed to join in a petition to the King claiming that the customs of the Manor compelled the Lord to make a new estate for life for the son or daughter of a deceased tenant. They also agreed to share the costs. The Star Chamber considered this maintenance in the sense of interference: "le joyner en fuit & contributer al charge pur common ou custome est loyal pur touts queux claime m[eme] le custome, mes n'est issint lou le tenure est en question, quia le tenure d[']un n'est le tenure dun aut[er]." Popham went further and affirmed that it was "un illoyal combinac[i]on n'est justifiable coment que contribuc[io]n soit [loyal]." They all agreed that it was "un illoyal combinac[io]n, coment que le complaint n'est censurable."

5.1.5 The *Poulterers' Case* and *Sir Anthony Ashley's Case* (1611)

We have come now to what has been considered the most important case in the history of modern conspiracy, a case that textbooks never fail to mention whenever they discuss the law of conspiracy.[1069] Although it is not the convention to do it this way, for reasons that will become clearer later, I have decided to join it to the sister *Sir Anthony Ashely Case*, which was almost simultaneous to it. There are good reasons to believe that in deciding the *Poulterers' Case*, the counsellors of the Star Chamber were also thinking in a principle that would apply to *Sir Anthony Ashley's Case*. For one thing, as we will see, in the *Poulterers' Case* there was an actual failed execution of the plot, for which the action was more in the nature of a remedy. In *Sir Anthony's Case* the plot had been set into motion, but had not failed. It was rather prevented from ripening by the Star Chamber.

As for the facts of the *Poulterers' Case* as revealed by the records of the Star Chamber, they illustrate many of the themes we have seen so far. They show how in actual

[1069] E.g.: "The first significant expansion of conspiracy occurred with the decision by the Court of the Star Chamber in 1611 of *Poulterers' Case*… thus, *Poulterers' Case* gave rise to a doctrine which survives to this day: the gist of conspiracy is the agreement, and so the agreement is punishable even if its purpose was not achieved," La Fave, W. & Scott Jr., Austin, *Criminal Law*, 2nd. (St. Paul, Minn.: West Publishing, 1986), 525. Cf. Fletcher, *Rethinking*, 222.

practice there was a connection between the ecclesiastical defamation, the new action on the case for slander, and the development of conspiracy in the Star Chamber. The case had started with an action for slander, which prompted a false prosecution, which prompted the action at the Star Chamber, which prompted an extrajudicial attempt to settle it by the ritual of public repentance. It also brings forward how important one's social capital was in the management of litigation, and how the litigation was the scenario where each side to a feud measured its power against the other. The Poultereres used all their resources to bring Stone down, and they incurred in all possible crime in relation to justice from barratry, maintenance, intimidation and threats, and countenance. Had he not been able to produce fifty witnesses at the Assizes, and to manage his multiple process through the assistance of his *friends*, it is safe to say that Stone would have been doomed.

The connection between slander and the expansion of the jurisdiction of the Star Chamber over conspiracy is particularly strong in this case. Initially, he sought to stop rumors accusing him generally of being a thief, and specially of having robbed Walters, by the action of slander. The consequence of his action was escalation and his prosecution. In that sense, it is necessary to remark that after he had been cleared at the Assizes, he moved an action before the Star Chamber, and the defendants offered public repentance if he dropped it. This is consistent with the idea that an ignoramus did not remove all suspicion from a person, and that the Star Chamber protected the reputation of the individual. As was the case with canonical purgation, in deciding a case of conspiracy the court would also adjudge whether the accusation was true. In other words, it is hard to think that after the Star Chamber conviction the Poulterers could be tempted to press charges again against Stone. What Stone mainly sought by bringing the action before the Star Chamber was to vindicate his reputation after he had been prosecuted.

The connection with the action on the case in the nature of conspiracy is manifest in the emphasis that these depositions collected by the commissioners put on the issue of ill will. If anything, the interrogatories focused on three main things: what the motives of Walters and the rest of the Poulterers were in prosecuting Stone, whether Walters or the others had some reasonable ground to suspect Stone, and what they intended with the prosecution. And what really transpires is that they did not act in pursuance of justice but out

of bad blood towards Stone. These depositions prove that the Poulterers held an old grudge against Stone for having started litigation against them, and that because of that they began to spread false rumors imputing him a robbery that had been committed upon Walters. They also show that Walters had no reasonable basis to identify Stone as one of the criminals other than a supposed false beard he would have worn the day of the robbery, and that his recollections of the facts were contradictory. Furthermore, they reveal that the hatred of the Poulterers grew in intensity when they were sued by Stone. And finally, they show that the Poulterers expressed their murderous intent in encouraging the prosecution against Stone.

5.1.5.1 The Facts of the Case

According to the depositions, the background of the case was a previous dispute between Stone and the other defendants. It all began when Thomas Stone married Alice Pigborne, widow of the late James Pigborne, poulterer, and decided to recover the debts owed by several members of the Company of Poulterers to the latter[1070] For that purpose he brought several actions against Edwarde Leake, John Vowell, Allen Baker, Thomas Moyse, Richard Keyes, Edward Hunter, and Thomas Okeley and his wife.[1071] At the time of the events that brought the case to the Star Chamber took place, the suits had been pending for 4, 5, and 6 years[1072] It transpires from the inquisitions taken by the Star Chamber's commissioners that "defendants along with other members of the trade had maliced and born evill to the complainant,"[1073] showing clearly a pattern of intimidation and harassment: they molested the trade of his wife, and they threatened Stone, forcing him to flee his home in Gracechurch Street.[1074]

The events of the case unfolded against this backdrop when Ralph Walters, apprentice with John Woodbridge and Henry Bates, appeared with a broken head and a bloody bandage

[1070] *Stone v Walters*. The National Archives: STAC 8/259/31. 1b. I use the page numbering indicated in the Annex II. To avoid being repetitive, I will omit "ib."

[1071] 1b, 13b.

[1072] 1b. This was a pattern of litigation at the time: a "woman who married, or a widow who remarried, might acquire a partner who took it upon himself to pursue claims possessed by his spouse which she had not dared do anything about," Bellamy, *Bastard Feudalism*, 57.

[1073] 1b.

[1074] 13b.

at the church of Ugley and to Newport pond in Essex to rise the hue and cry for a robbery.[1075] John Avery, who would later be a juror at the Essex Assizes where Stone was prosecuted, wrote down the hue and cry report.[1076] Walters reported that one of the robbers rode a grey horse, that he was robbed a fardel of gear from one Morris, and that the robbers bonded his hand and foot, to which his swollen hands attested.[1077] He also reported that one of the men had his face covered with a false beard.[1078] After that, John Avery came to some people of the party of the Hue and Cry, including the high constable, to check whether Walters' report was true.[1079] The members of the party confirmed that when they got to the crime scene they found Walters's horse, and that the surcingle was cut, the panniers riffled, and the stuff of the saddle plucked out as if someone had searched for valuables.[1080]

Walters went next to Geoffrey Nightingale, JP in the county of Essex who examined the whole matter. Since Walters could not produce the names of the robbers, the JP withheld issuing any warrant for the apprehension of the suspect and told him to wait until the next Sessions and see if he was able to learn their names.[1081] The next Thursday after the robbery Walters took John Woodbridge and some other Poulterers, later defendants in the action at the Star Chamber, to the scene of the crime where they sought the money they believed the robbers to have let fall.[1082] That Sunday, some witnesses saw a horse riding alone that was probably Walters'.[1083]

On May 5, 1608 Walters, along with Anthony Hakes and Simon Joy, tried to apprehend Thomas Stone at Enfield.[1084] They were riding together on the King's Highway, when Walters told them that he thought he had recognized the man who robbed him of his

[1075] 70b, 71b, 73a, 83b, 84b.

[1076] Not numbered page, 41b

[1077] Not numbered page, 71b, 72 b.

[1078] 73a.

[1079] 71b, 72a, 73a.

[1080] 70b, 71a.

[1081] 70b, 72a, 73b, 85a-85b, 87b.

[1082] 72b.

[1083] 76a.

[1084] 37b.

clothes. Hakes made him ride back and make sure it was him.[1085] As he was positive, the three men chased Stone. Then Hakes went to Enfield to ask for help, where the constable was lame and the headborough was not available. He was told by the people he asked for help that anybody could stop a suspect of felony. When Hakes came back for Walters and Joy, they had apprehended Stone. Hakes recognized that Stone was a member of the Company of Poulterers and a servant to the king, and thought that Walters might be wrong about him, and wanted him to let Stone go.[1086] Stone, indeed, was on his way to let Lord Denny know that the king intended him and Sir Henry Cock, who was sending Stone, to have dinner at the latter's house the next day.[1087]

Stone reported the incident to the Greencloth, and Walters was summoned before Sir Henry Cock, Sir Robert Banester, and Sir Marmaduke Correll. He was charged with assaulting Stone and accusing him of robbery while on the king's service.[1088] Walters said that he was mistaken, and prayed that his offence would be forgiven and remitted.[1089] The court bound him to good behavior. Henry Stapleford, who was there along with other of the later defendants in the Star Chamber, undertook the bond, saying that Walters was an honest man.[1090]

The following days the Poulterers began to spread false rumors about Thomas Stone in London. Walters, Hakes and Joy said at Newgate Market that Stone was a "theife and a gentleman theife."[1091] Walters also told George Bromeley and John Woodbridge, and his wife that he had been robbed by Stone.[1092] Another Poulterer said at a place called the Shambles that Stone was known by a scarf he wore about his neck and face, and that he knew a man who had escaped robbery from him.[1093] After May 10, at Gracechurch Street, one of

[1085] 168b.

[1086] 169b.

[1087] 38b. See also 132b, 143a-143b, 101b-102b.

[1088] 38b, 143b.

[1089] 38b.

[1090] 38b-39b, 143b, 146b.

[1091] 1b-2a, 7a.

[1092] 105b.

[1093] 38b.

the Poulterers' wives reported that Walters had been robbed, and that before the JP he had taken Stone by the beard saying that that beard had robbed him.[1094] In early June, Avis Barrakey, a chairwoman and servant to Stone, while at the house of James Harlowe, heard his wife Elizabeth telling him that she once heard a washwoman she had at home asking whether Stone was a gentleman thief. Elizabeth asked her husband if this was true, but he reprehended her.[1095] Other defendants' wives also reported that Stone was robbing people under color of the king service to maintain his children and wife.[1096]

Stone tried to put a stop to the rumors by bringing a new action at the Greencloth[1097] against Hakes, Nicholas Kefford, William Burte, Allen Baker and wife and sister, James Harlow and wife, and Walters, for slandering him with false reports that he was a gentleman thief and that he had committed the robbery on Walters. Henry Stapleford and William Woodbridge came along with Walters.[1098] Walters told the clerk of the Greencloth that he was mistaken.[1099] The other defendants persuaded Walters to withstand his accusation so that they would not be adjudged for slander,[1100] and Henry Stapleford promised that John Woodbridge would be bound in 100 pounds that Walters would press charges against Stone.[1101] The Poulterers unsuccessfully tried to stay the proceedings by suing a writ of privilege to remove the action to the Common Pleas,[1102] and then by a writ of habeas corpus to remove it to the King's Bench.[1103] The verdict was for Stone, giving him damages in a hundred marks,[1104] but the Poulterers were able to stay judgment for nine month by suing a

[1094] 89b.

[1095] 53b, 130a, 147b.

[1096] 4a. On the role of women in defamation see (Helmholz, *Canon Law*, 575-6).

[1097] 50b. The source speaks of the counting house but I presume that it is the Greencloth. Later it talks about a suit for slanderous words at the Sheriff's court in the Guildhall of London. Again, it is probably the same case that might have been removed to this court. Or maybe the deponents were mistaken about what the court was.

[1098] 2a, 7a-8a, 39b, 42b, 126b.

[1099] 126b, 132b.

[1100] 2a, 7b.

[1101] 132b.

[1102] 42b, 43b, 127a, 102b-103a.

[1103] 144b, 43b, 44b, 103a.

[1104] 44b.

writ of error and having Walters banished from London.[1105] Henry Bate paid all the fees and charges for Walters.[1106]

While the sue was still pending, upset because Stone had not warned them of the lawsuits, Henry Stapleford, Nicholas Kefford, and William Birte met at the Guildhall "to Consulte plott practize conspire or conclude to haue [Stone] indicted for robbing Raphe Walters… or to take awaye… [his] lyefe in that respecte, or to begg his lands goods Chattells… under coulor [of the law].[1107]" That very same day, the Masters and Wardens of the Company of Poulterers sent their beadle for Margory Bromeley to come to the hall. They wanted to learn from her mouth what the estate and wealth of Stone was.[1108]

Then, they procured a warrant from Sir Thomas Bennet JP, for the arrest of Stone.[1109] He was brought to be examined before another London JP, Stephen Soame.[1110] Walters charged Stone with having robbed him of 30 shillings, a cloak, a hat, and the outside of a woman's gown.[1111] He affirmed that at the time of the robbery Stone was wearing a false beard.[1112] Soame bound him to give evidence at the Sessions at Newgate.[1113]

Within a quarter hour from the arrest, William Birt and the Master Warden of the Company of Poulterers came into Stone's shop demanding from his servants and Stone's wife whatever goods he might have.[1114] They told them that Stone should have taken his complaint to the Company of Poulterers and that Stone was doomed.[1115] Stone's wife, who was expecting, was so scared that she was afraid she was going to have an untimely delivery.[1116]

[1105] 43b, 44b, 45b, 50b, 103b, 144b.

[1106] 103b.

[1107] 48 a-49b, 8a, 53a, 56b, 14b.

[1108] 2a, 14b.

[1109] 2b, 49a.

[1110] 49a, 94b.

[1111] 47b, 104b.

[1112] 48b.

[1113] 48b.

[1114] 2b.

[1115] 3a.

[1116] 15a.

During the following days before the Assizes, the Poulterers engaged in a systematic campaign to make the lives of Stone and his family unbearable, and to interfere with their trade and ruin his reputation. They told them that they would force them to leave Gracechurch Street.[1117] They took away the wares of his mother-in-law without paying.[1118] They said to other people that if they could find a hole in his coat they would hang him off it, and that they would have his wife and mother-in-law crying in the streets.[1119] The defendants' wives came to Stone's house to watch the goods carried out from it intending that he would be hanged.[1120] One of them mocked her for saying that her husband was an honest man, and told her that after they were done with him they would make her go back to the place where she was born.[1121] Other defendants spread the rumor that Stone had sold his royal office to beg his pardon.[1122] They continued to call him a gentleman thief and a knave.[1123]

At the Sessions held at the Old Bailey, Walters repeated what he had declared before the JP, but he was warned by the Lord Bishop of London that the wearing of the false beard was very unlikely because Stone usually wore a natural one.[1124] The court determined that because the events had taken place in Essex, the case ought to be heard at the next Assizes at Chelmsford. Stone was bound to answer, and Walters to give evidence. Henry Bate, John Woodbridge, Allen Baker, and Anthony Baker, who were present, were bound by recognizances as sureties for Walters.[1125] After the Sessions, they went to a tavern to drink, where they were heard to have said that they would have Stone hanged.[1126]

[1117] 1b, 3b.

[1118] 1b, 7a.

[1119] 3b.

[1120] 4a, 16b.

[1121] 4a, 17a.

[1122] 11a.

[1123] 52a, 92b, 93a.

[1124] 48b, 98b, 58b.

[1125] 48b, 49b.

[1126] 99a.

The Assizes at Chelmsford were held on July 4, 1608.[1127] Henry Bate, John Woodbridge, Anthony Hake, Symon Joyce, Edward Leake, Allen Baker, Henry Stapleford and John Raymond came along with Walters, giving evidence to the Grand Jury and affirming his honesty.[1128] Upon oath Walters gave evidence repeating the same charges he had given before the JP and at the Quarter Sessions in the Old Bailey.[1129] He denied that those who robbed him had any grey horse. However, John Avery, who had taken the report after the hue and cry, and who was now one of the jurors, showed a copy of Walters's own words affirming that there was a grey horse.[1130] Nightingale JP certified the examinations he had made at the time of the hue and cry.[1131] It seems that some people had bribed the sheriff's men to have Stone into the dock among the other felons to disgrace him.[1132] One of the justices of Assize commented on the people that came along and encouraged Walters that they seemed to be willing to have Stone hanged.[1133]

Stone, nevertheless, had an alibi. He had been in London the day the robbery was supposed to have taken place. Stone brought some thirty people to bear testimony to his abode in London the day of the crime as well as for his honesty and good character.[1134] The witnesses were heard but they were not allowed to swear to their testimony because they were not of the prosecution.[1135] Among others, Thomas Standford had been with him around 2 pm. One Richard Palfreman had been with him between 4 pm and 6 pm. Robert Hull was two times at his house.[1136] Furthermore, his horse was all day at one Hall's Stable. The jury found an ignoramus and Stone was discharged.[1137]

[1127] 146b; 1609 in 48b.

[1128] 3a, 15b, 106b, 99b.

[1129] Not numbered, 3b, 9b, 15b, 41b, 70b, 99b, 105b.

[1130] 41b. This proves that in many respects juries continued to be self-informing into the seventeenth century.

[1131] 89b.

[1132] 41b.

[1133] 145b.

[1134] 5b.

[1135] 5b, 12b.

[1136] 107a.

[1137] 5b.

Subsequently, Stone brought an action before the Star Chamber to "cleere & free himselfe from the imputation & practices contayned in his Bill against the defendants in this Court [Star Chamber]."[1138] The now defendants tried to settle this extrajudicially. Bates and Woodbridge admitted to Stone that they might have been mistaken, and sent him a letter proposing that he if dropped the suit "Walters should submitte himself and vpon his knees acknowledge before the Greeneclothe, openly in the Guildhall where the s[ay]ed Cause depended, and amongeste his neighebors, in the p[ari]she Churche, that hee the sayed Walters had mistaken the s[ay]ed Stoane wronged him in falsely chardging him w[i]th the s[ay]ed robbery."[1139] Several other defendants asked John Marshall, a chandler, to help them make peace with Stone. They told him that they never held any ill will towards him, that they always thought well of him as an honest man and never gave him any reason for suing them.[1140] Later, when the process started, they accused Stone of barratry,[1141] and intimidated some of his witnesses.[1142]

5.1.5.2 The Acquittal Requirement

At the Star Chamber hearing, the counsel for the defendant objected two main issues. Firstly, that "admitting this combination, confederacy, and agreement between them to indict the plaintiff to be false, and malicious, that yet no action lies for it in this Court, or elsewhere… because no writ of conspiracy for the party grieved, or indictment or other suit for the King lies, but where the party grieved is indicted, and legitimo modo acquietatus."[1143]

Coke tells us that the court conceded this, but that it declared and applied the common law principle that "a false conspiracy betwixt divers persons shall be punished, although nothing be put in execution."[1144] And in support of that principle, the following authorities were rallied:

[1138] 58a.

[1139] Not numbered b.

[1140] 55a.

[1141] 49b-50a, 53b,

[1142] 4b, 6a, 12b, 13a, 18b, 129b, 134b.

[1143] 9 Co 55b-56a, 73 ER 813, 814.

[1144] 9 Co Rep 55b, 56 b; 73 ER 813, 814.

> In 27 Ass. P. 44 in the articles of the charge of enquiry by the inquest in the King's Bench, there is a nota, that two were indicted of confederacy, each of them to maintain the other, whether their matter be true, or false, and notwithstanding that nothing was supposed to be put in execution, the parties were forced to answer to it, because the thing is forbidden by the law… so there in the next article in the same book, inquiry shall be of conspirators and confederates, who agree amongst themselves, &c. falsly to indict, or acquit, &c…. and there is another article concerning conspiracy betwixt merchants… and it is held in 19 R. 2 Brief 926. a man shall have a writ of conspiracy, although they do nothing but conspire together, and he shall recover damages, and they may be also indicted thereof. Also the usual commission of oyer and terminer gives power to the commissioners to enquire, &c. de omnibus coadunatibus, confoederationibus, et falsis alligantis… in these cases before the unlawful act executed the law punishes the coadunation, confederacy or false alliance, to the end to prevent the unlawful act, quia quando aliquid prohibetur, prohibetur et id per quod pervenitur al illud: et affectus puniter licet non sequatur effectus; and in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it. Hil. 37 H. 8. in the Star-Chamber a priest was stigmatized with F. and A. in his forehead, and set upon the pillory in Cheapside, with a written paper, for false accusation. M. 3 & 4 Ph. & Ma. one also for the like cause fuit stigmaticus with F. & A. in the cheek, with such superscription as is aforesaid. Vide Proverb' 1. Si te lactaverint peccatores et dixerint, veni nobiscum ut insidiemur sanguini, abscondamus tendiculas contra insontem frustra, &c. omnem pretiosam substantiam reperiemus et implebimus domus nostras spoliis, &c. Fili mi ne ambules cum eis, &c. pedes enim eorum ad malum currunt, et festinant ut effundant sanguinem."[1145]

It has been pointed out that Coke's sources do not support this proposition, and that they all postdate the Statute of Conspirators so that it cannot be argued as a common law rule.[1146] Most important, however, is the range of authorities that Coke cites in support of this principle: from the Year Books, to the articles of the Eyre, to legal maxims and citations from the Bible. It is highly possible that this incoherent assortment was the result of Coke's editing. Since the Star Chamber was a collegiate court and it was normal that the councilors each gave their own opinion, it all seems to indicate that Coke synthesized them into this principle, and that here he subsumes the authorities on which each of these opinions were based under this principle as if they all concurred on the grounds for this decision.

The real sense of this passage becomes clearer if we interpret it considering what we know about Coke's use of the doctrine that the will must be taken for the deed. In doing so,

[1145] 9 Co Rep 55b, 56b; 73 ER 813, 814-5.

[1146] Wright, *Conspiracy*, 13-14.

it becomes self-evident. We already know that Coke held that at the ancient common law the doctrine that the will must be taken for the deed applied to acts tending to the execution of an intent. We also know that for Coke, acts tending to the execution of an intent meant what we will call a failure, that is, a consummated act that nevertheless did not have the expected consequence. It should be recalled here that Coke understood this doctrine not as if the intent was punishable in itself, but in the sense that what makes an act criminal is the intent, independently of the consequence. And finally, we know that for Coke this doctrine made the false accusation to appear within the periphery of murder, as a sort of or kind of murder. Therefore, Coke considered the offense of conspiracy to be based on the ancient law that the intent to murder by color of law was itself punishable. The insistence of the depositions of the *Poulterers' Case* on the murderous intent of the defendants supports this interpretation.

These would be the grounds upon which the Court of Star Chamber visited malicious prosecutions with punishments, as attempts of murder. Further evidence that the Court of Star Chamber held this view can be inferred from the punishment mentioned here of branding the false accusers in the head with the letters F. and A. This punishment appears in most the abovementioned cases decided in the Star Chamber. This is clearly inspired by the Roman punishment for the calumniator of branding the letter K on his forehead. This implies that the councilors of the Star Chamber drew an analogy with calumny. And this offence was first visited with the talionic punishment which presumes that accusers were murderers in will.[1147]

[1147] Radin, *Maintenance*, 52, n (16). It should be noted that the opposite of this principle, that is, that the intent must not be taken for the action, was appealed to protect local officers in *Bagg's Case* (1616), 11 Co Rep 93b; 77 ER 1271 where the issue was raised as to what was sufficient cause to disenfranchise a freeman of a city of his liberty. Having resolved that "the cause of disfranchisement ought to be grounded upon an Act which is against the duty of a citizen or burgess, and to the prejudice of the public good…and against his oath" (98a, 1278) it was determined that "words of contempt… are good causes to punish him, as to commit till he has found sureties of his good behavior, but not to disenfranchise him" (11 Co Rep 98a-b). And the rationale was that "if he intends, or endeavours of himself, or conspires with others, to do a thing against the duty or trust of his freedom… but he doth not execute it… non officit conatus, nisi sequitur effectus; and non officit affectus, nisi sequitur effectus… the matter which shall be a cause of his disfranchisement, ought to be an act or deed, and not a conation, or an endeavor, which he may repent of before the execution of it, and from whence no prejudice ensues; and they who have offices of trust and confidence shall not forfeit them by endeavours and intentions to do acts, although they declare them by express words, unless the act itself shall ensue, as if one who has the keeping of a park should say, that he will kill all the game within his custody, or will cut down so many trees within the part, but doth not kill any of the game, nor cut down any trees… without any act done, in none of those cases is it any cause of deprivation; for in those cases, voluntas non reputatur pro facto "(98b, 1278-9); see also 1 Rolle 224.

5.1.5.3 Sir Anthony Ashley's Case (1611)

In the abovementioned passage, Coke said that "in these cases before the unlawful act executed the law punishes the coadunation, confederacy or false alliance, *to the end to prevent the unlawful act*."[1148] Strictly speaking, this principle could not be applied to the Poulterers' conspiracies which had been executed. Stone did not seek prevention, but rather redress. Instead, this comment might have been made with reference to the case of Sir Anthony Ashley, which was pending in the Star Chamber since 1609, and about to be decided.

Born to a noble family, under the patronage of Lord Chancellor Hutton, Sir Anthony Ashley, had been elected MP in 1588 and 1592, and had been appointed clerk to the Privy Council in 1587. After Hutton was succeeded by Lord Burghley as Lord Chancellor, he was disgraced by accusations of corruption and perversion of justice leading to his suspension from office. Although he was to be reappointed again in 1603, he was suspended again in 1609 when he was charged with the murder of William Ryce in 1591.[1149]

During the proceedings at the Star Chamber, it came out that James Creighton had bought a pretended right in lands Sir Anthony was possessed of. Probably seeking the escheat or at least to get his rights via forfeiture of Sir Anthony Ashley's lands, Creighton then moved several actions in the Common Bench to recover unpaid fines for several misdemeanors committed by Sir Anthony Ashley. It was at this point that Ashley had been suspended from office. As probably Creighton continued to be unsuccessful in his purpose, he planned with Henry Smith, former servant of Sir Anthony, that the latter would accuse him of the murder by poisoning of William Rice, the husband of Mary Rice, deceased some eighteen years earlier (probably from some venereal disease). In exchange for that, Sir James Creighton promised and obliged himself, putting into writing that Henry Smith should have a share in the forfeitures, an office for his uncle, a royal protection against his creditors, and a general pardon of all offences. In addition to that, James entered in a similar agreement put into writing, to share a portion of the lands, goods, and chattels that would be forfeited from

[1148] 9 Co Rep 56b, 57a; 73 ER 813, 815.

[1149] Michael Hicks, "Ashley, Sir Anthony, baronet (1551/2–1628)," first published 2004, online edition, Jan 2008. Oxford DNB http://dx.doi.org/10.1093/ref:odnb/757

Ashley with John Cantrell, who was made responsible for bringing the witnesses against Ashley.

According to their plan, they had the widow of Rice bring a petition to the King, accusing Sir Anthony Ashley of the alleged murder. The petition was referred to the Chief Justice of the King's Bench, who, after examination of the witnesses on both sides, determined that there was "a false conspiracy, to indict Sir Anthony *without any just ground*,"[1150] taking notice of the written agreements. Thus, the case was assigned to be heard and determined at the Star Chamber.

Upon hearing, the defense counsel raised two issues. The first was that allowing such proceedings in which defendants are able to "exhibit his bill in Court against the accuser and all the witnesses… will deter men to prosecute against great offenders, and thence great offenses will pass unpunished, which will be dangerous to the weal public."[1151] The second was that "by the law, conspiracy lies when a man is indicted, and legitimo modo acquietatus: but here he was never indicted."[1152] It was ruled against the first objection that "in this case the bill was maintenable, although that the party accused was not indicted and acquitted before, as it was resolved in this Court [Star Chamber], Hil. 8 Jac in *Poulterers' Case*."[1153]

Now, according to the reports, in this case there never was an indictment against Sir Anthony.[1154] Thus, in this case it can be said that the conspiracy was crashed before it had been put into execution. In this way, it is probable that the *Poulterers' Case* was decided with an eye on this case that was going to be decided almost at the same time, and which, indeed, ended up citing it.

[1150] 12 Co Rep 90, 91; 77 ER 1366, 1367,

[1151] 12 Co Rep 90, 91; 77 ER 1366, 1367-8.

[1152] 12 Co Rep 90, 91; 77 ER 1366, 1368.

[1153] 12 Co Rep 90, 92; 77 ER 1366,1368; Moore 816, 817.

[1154] Hudson refers to this case inconsistently, saying that "his accusers prosecuted him by indictment at the common law; he sled to this court to stop the current of their malice; and he complained that divers persons, some out of malice, some out of covetousness, and some to relieve their necessities, had conspired together falsely and unjustly to accuse him of this act, to beg his estate of his majesty to themselves; and thereupon obtained a stay of the prosecution against him, and proved his accusation against Sir James Creton," Hudson TSC 17, 18. Elsewhere, however, he referred to *Sir Anthony Ashley's* as having been "discovered before it come so far" as the indictment, ib. 105, but only a petition to the King to inquire on this matter.

In support of this thesis it can be added that Coke added a note to the reader of the case specifying the requirements these conspiracies punishable before execution should meet, among which was the requirement that "it ought to be declared by some manner of prosecution, as in this case it was, either by making of bonds, or promises one to the other."[1155] Now, he could not be referring to the *Poulterers' Case* because there was no such evidence as bonds or promises, but clearly to *Sir Anthony Ashley's Case*, where James Chreighton had bound himself to the people who were going to bear the accusation and evidence promising them a share in the estate of the victim.

5.1.5.4 The Narrow Principle

Having said all this, it follows that Coke, or the Star Chamber for that matter, did not intent to lay down a general principle in this case. In is true that the principle was expressed with general words such as that conspiracies were punishable before execution at common law. But, as I have tried to argue, the idea behind this principle is that a false accusation is a form of homicide, and that according to the doctrine that the will must be taken for the deed, a failed or thwarted false accusation is an attempt of murder. Thus, the application of the principle is limited to the context of the perversion of justice.

There is no better evidence that this narrow interpretation as to the scope of the principle expressed in the *Poulterers' Case* than the note Coke added explaining the requirements that "these confederacies, punishable by law, before they are executed" must fulfill: "1. It ought to be declared by some manner of prosecution, as in this case was, either by making bonds, or promises one to the other: 2. It ought to be malicious, as for unjust revenge, &c. 3. It ought to be false against an innocent: 4. It ought to be out of Court voluntarily."[1156]

The first condition expresses a rule of evidence that should be interpreted upon the similar requirement in high treason that the compassing or imagining of the death of the king must "declare the same by overt act." which there was defined as an act "tending to the

[1155] 9 Co Rep 55b, 57a; 73 ER 813, 815.

[1156] Ib.

execution of his intent."[1157] That is, for a mere intent to murder to be punishable, it must be declared by some overt act, since intent itself is not knowable. There Coke seemed to consider only failures as such acts, but in this case, he is referring to mere preparations. Indeed, the mere agreements are considered here as an overt act. As mentioned above, the example Coke provides of overt act may well refer to *Sir Anthony's Case*.

The second and third requirements are the same subjective grounds that grant an action upon the case in the nature of conspiracy: ill will and falsehood. These requirements are inconsistent with the former, since if the punishable thing is the plot or purpose of the agreement, as revealed by the written agreements, it is redundant to say that it need be malicious and false. But then again, we should think that these requirements were elaborated when thinking in two different cases. If we think of the circumstances of the *Poulterers' Case*, where the plot or conspiracy was consummated but did not have the expected effect because the jury ignored the bill of indictment, then, in that circumstance, the decisive elements that turn this bill into a malicious prosecution were the malice and falsity. It was the Poulterers who acted for unjust revenge.

The fourth requirement also belongs to the frame the action on the case. It limits the scope of such form of prosecution granting immunity to those who are acting under a judicial office or who are bound by oath and court proceedings to act for the king: judges of record and jurors. This was but affirming the principles recently laid down for the proceedings by writ and indictment of conspiracy by the Star Chamber in *Floyd v Barker* (1608) 12 Co Rep 23-5; 77 ER 1305-8.

In conclusion, whereas the *Poulterers' Case* lent itself to be decided on similar grounds to those of malicious prosecution, *Sir Anthony Ashley's*, where there was no Grand Jury ignoramus, was better suited for the view that a plot to murder should be punished in itself. The test is that in the latter there was no actual wrongdoing and damage, and that it would had not given right to bring an action upon the case. In other words, there was no wrongful prosecution. But in the *Poulterers' Case* there was such wrongful prosecution with

[1157] 3 Inst 7.

its share of slander (as it comes across the depositions) and false imprisonment. This wrong, indeed, was part of the rationale of the case.

5.1.5.5 The Law of Mercy

The second issue that was raised in the *Poulterers' Case* was whether allowing an action after ignoramus would not spur:

> Everyone who knows himself guilty… to cover their offences, and to terrify or discourage those who would prosecute the cause against them, surmise a confederacy, combination, or agreement betwixt them, and by such means notorious offenders will escape unpunished, or at least, justice will be in danger of being perverted, and great offences smothered.[1158]

As we have seen, this argument was raised by those who believed that prosecutors should be protected from legal actions,[1159] and that things should remain the same with the writ and indictment of conspiracy as the only remedies available against legal oppression and abuse of the criminal procedure. However, the Star Chamber was more concerned with the protection of the innocent from oppression by the machinery of law than with the protection of prosecutors from disgruntled defendants. As we have seen, the Star Chamber took notice that false prosecutions could be really damaging for defendants, and that in any case they vexed and unnecessarily troubled defendants.

Thus, in the *Poulterers' Case* it was argued that in punishing conspiracies before execution, "the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it."[1160] This concept of the 'law of mercy' can be understood in a narrow sense as embracing rights prisoners' enjoy as common law procedural protections. Thus, according to Coke, among other reasons, the common law was a 'law of mercy' in that "the innocent shall not be worn and wasted by long imprisonment, but… speedily come to his triall," that "prisoners for criminal causes, when they are brought to their trial, be humanely dealt withal," and that "the judge ought not to exhort him to answer

---

[1158] 9 Co Rep 55b, 73 ER 813. See also *Sir Anthony Ashley's Case* where it is said that punishing prosecutors "will deter men to prosecute against great offenders, and thence great offenses will pass unpunished, which will be dangerous to the weal public 12 Co Rep 90, 91, 77 ER 1366, 1368.

[1159] Cf. 12 Co Rep 90, 91; 77 ER 1366, 1368) Latch 79, 79 ER 618; Benl 152, 73 ER 1019; Raym T 180, 83 ER 95.

[1160] 9 Co Rep 55b, 57a; 73 ER 813, 815.

without fear, and that justice shall be duly administered to him."[1161] In the *Poulterers' Case,* this principle was rephrased as that the common law "not only favours the life, but also the liberty of a man, and freedom from imprisonment," and the old procedure by the writ of *odio et atia* is presented as evidence of the "means by the common law before indictment to protect the innocent against false accusation, and to deliver him out of prison."[1162] Thus, in a wider sense, the concept of the 'law of mercy' means the protection of the innocent against legal abuse in general.[1163]

This suggests that the Court saw the main goal of the common law conspiracy as protecting innocents against false accusations (see also, in discussing the different forms of punishment available at the Star Chamber, how Hudson argues that among other crimes branding is applied for "conspirators to take away the life of innocents."[1164] Indeed, as we have seen, both the writ and the indictment of conspiracy were thought to be instituted for the protection of the innocent's blood. That means that Coke understood these remedies as aimed at the protection of defendants' rights. Thus, in this debate between those who sought to protect prosecutors from criminal or civil liability, Coke chose the defendants and preferred to discourage prosecution. This is a change with regard to the traditional view that always looked with suspicion at those who had been charged with some offence. But it also was a way to regulate private prosecutions so that only serious charges that would secure conviction would be brought.

5.2 The Integration of High Treason: *Starling Case* (1665)

In this case the attorney general had proceeded against Samuel Starling and other members of the Corporation of London Brewers by information that they did:

> factiously and unlawfully assemble themselves, and conspire to impoverish the excise-men, and made orders, that no small-beer called gallon beer should be made for such or so long time to be sold to the poor, not no ale but of such a price, with the intent to move the common people to pull down the Excise-House, and bring the

[1161] 2 Inst 315-6.

[1162] 9 Co Rep 55b, 56b; 73 ER 813, 814.

[1163] For instance, the concept of law of mercy could also embrace the procedural discretional penalties of the amercements in civil litigation because they "deterre both demaundants and plaintiffs from unjust fuits, and tenants, and defendants from unjust defences," 2 Inst 28.

[1164] Hudson TSC 224.

excise-men into the hatred of the people, and to impoverish and disable them from paying their rent… to the King.[1165]

The jury found the first part of the information comprising the unlawful assembly and the conspiracy, but acquitted the brewers of the actions taken as a consequence of the those. The facts found by the jury can be listed this way:

-The brewers had factitiously and unlawfully assembled together.

-The brewers had factitiously and unlawfully conspired together.

-The object of the conspiracy was to restrict the production of beer.

-The object of the restriction of the production of beer was to bring common people to pull down the excise house, to impoverish the tax farmers, and to render them unable to pay their rent to the king.

Subsequently, the brewers moved in arrest of judgment raising three issues: that lacking the formulaic *vi & armis*, the allegation of unlawful assembly was insufficient; that the conspiracy was not punishable without any act done in prosecution of it; and that having been found that the purpose of the assembly and conspiracy was only to impoverish the tax farmers, that was not a public purpose, and therefore was not punishable.

These objections already hint at the several mental spaces that the information against the London Brewers activated: the frame of unlawful assembly ("unlawfully assembled themselves"), that of high treason ("conspire to… made orders… intent to move down common people to pull down the Excise-House, etc.), and within this, that of constructive treason (assemble themselves and conspire… with intent to move people, etc.). In addition to these, there were two other frames that were activated by this: the action on the case frame (conspire to impoverish the excise-men), and the precedents of conspiracy frame (conspire to… and made orders, that, etc.).

Though the Court agreed that the London brewers were punishable for conspiracy and unlawful assembly as described in the information, the justices disagreed as to how to interpret the facts contained within that information as listed above, and therefore, as to the

[1165] 1 Lev 125, 83 ER 331; See also 1 Sid 174, 83 ER 1039.

rationale for punishment. There were three main interpretations: that the brewers had committed a punishable plot revealed by the overt act of assembling; that they had committed an unlawful assembly punishable because of its public purpose; and that they had entered into a punishable alliance. As we will see, these interpretations relied indeed on mappings between the several frames that the information activated.

5.2.1 The Brewers as Having Committed a Punishable Plot

It should be recalled now that the mapping between the offense of compassing the death of the king, and the doctrine that the will must be taken for the deed, resulted in the interpretation that compassing was like punishable intent, and that since intent was not cognizable to human mind, it follows the requirement that there should be an overt act revealing that intent to the world. Within the domain of high treason, *conspiracy* was synonymous with *compassing*, alongside with *design, plot, machination,* etc., denoting all of them the concept of 'plan or plot to do something.' The fact that all these structural lexical relations remained within the target domain implied that these words would be seen also as denoting the same concept of 'intent.'[1166] And the causal slot or frame within which intent is viewed in the domain of the doctrine of voluntas, as the cause of an action rather than its direction, would also transfer from that domain to that of high treason. Furthermore, because this mapping resulted in turn in a new blended domain, this potentially led to a new category of offenses, that of the crimes or offences of the will, onto which the factual situations of what we might call today murder attempt, and within this, false accusation, or robbery attempt, would be integrated.

The next step in the transformation of high treason was the mapping of the 'compassing the king's death' onto the case of high treason of 'levy war,' thus resulting into a new possibility, the treason of 'compassing to levy war,' or, as it was put, the treason of 'conspiring to levy war.' And this allowed another analogy between this new mapping and the treason of constructive levy of war, from which the possibility of a 'compassing to commit a constructive levying of war' resulted. All along these mappings, the requirement

[1166] (Thus, in the reports of *Starling Case* the term *conspiracy* would occur meaning 'plot', and as a synonym of *consultation, plotting, contriving, design*; 1 Lev 125, 83 ER 331; 1 Keble 650, 83 ER 1164; 1 Keble 675, 83 ER 1179. And the adjective *bare* usually implies the distinction between *bare conspiracy* and *overt act*, that is mere intent as in spoken words, and written words and other acts evidencing that intent.

that there must be an overt act was transferred to the target domain. Thus, finally, in the case of the brewers, under this interpretation, they would have committed such offence as constructive treason.

One line of argument was objecting that the information did not support the overt act requirement. Thus, the defense argued that "the defendants were charged for conspiracy to deprive the King of his customs and excise, and to depauperate the fermors, which is not material, the defendants being found not guilty of all the overt acts alledged in pursuit of the conspiracy, and of any hindring the Kings revenue." The prosecutor replied by implying the overt acts from the allegation of unlawful conspiracy which would entail "their agreement to contribute money to take away the gallon trade, and that they made orders to brew only small beer for three months." And also, that "the conspiracy, although an act ad intra, yet the communication thereof is an overt act… and punishable although nothing ensue thereon, and the conspiracy is the crime… the other acts are but particular instances of it". But part of the court relied on the argument that "the very consultation is an offence, as Poulters case, without any overt act." [1167]

This argument of the prosecutor showed how the blended form could be integrated within the category of 'conspiracy' along with precedents such as the *Poulterers' Case*, and understood now as crime of the will. Although the inference was now different as this category appeared conceptualized as a "a conspiracy to do an unlawful thing", which is "punishable without any overt act done."[1168] Thus, Keeling Justice opined that "this bare conspiracy is a great crime, where it is to do that which is evil, although to private person; so is the Poulterers case." In other words, the integration of the *Poulterers' Case*, along with others, within the same category of crime of the will led to a different conclusion, as the overt act requirement was not explicitly expressed in that case (though the frame was implicitly entailed in the note that set forth the conditions such conspiracies must comply with).

[1167] 1 Keble 650, 83 ER 1164.

[1168] 1 Lev 125, 83 ER 331, the precedents being *Lord's Grayes Case*, which was a case of maintenance, and *Scrogg and Midwinter's Case*, of which I shall speak in short.

5.2.2 The Brewers as Having Entered into a Punishable Alliance

This integration was only possible if the *Poulterers' Case* was interpreted in a certain way as dealing with a crime of the will. Windham J., however, took a different view on both the *Poulterers' Case* and the reasons for punishing the Brewers. He mapped the *Poulterers' Case* with the definition of conspirators of the Statute of Conspirators, and with the action upon the case, to draw a distinction between 'conspiracy' and 'confederacy.' Thus, he argued that the brewers were "acquitted of conspiracy, which properly is where its [sic] to indict men for their lives, and this is that whereon the writ lieth; but the false alliance and union by mutual swearing to maintain quarrels, is rather a confederacy… it if were a conspiracy, there ought to have been some overt act expressed."[1169]

That is, on the one hand, Widham interprets the conspiracy to falsely indict someone as a crime of the will, subject to the overt act requirement, "as if H. be indicted for forestalling, or being common thief, or barretor or conspirator". On the other hand, he seems to interpret the *Poulterers' Case* from the point of view of the Definition of Conspirators, where confederacy means 'false alliance and union by mutual swearing', punishable in itself. Thus, he interpreted that "the defendants [are] found guilty of confederacy, as in the Poulterers case," and therefore, "here is enough found to give judgment against them for a confederacy, by their assembling together, their consultation and conspiracy, which is as much a false alliance, as if they had bound themselves by oath, &c."[1170] Thus, Windham takes indeed the crime of conspiracy to be part of this category of crimes of the will, and distinguishes it from 'confederacy,' meaning a bond or association to pursue some unlawful purpose as in this case.

This must be the sense with which the prosecution argued that "the very conspiracy to do a lawful act to the prejudice of a third person is enquirable and punishable in B.R. inter les articles, 27 Ass."[1171]

[1169] 1 Keble 675, 83 ER 1179.

[1170] Ib.

[1171] 1 Keble 650, 83 ER 1164. Notice that the articles of 27 Ass. were cited in the *Poulterers' Case*.

Twisden J., who by contrast, believed that the brewers had committed a crime of the will rather than one of association, replied to Windham that "intent, whilst private, is fluctuating, and so cannot be punished, but when declared by act, is punishable…" and although he qualified this in that "voluntas non reputabitur pro facto," that is, intent cannot be the basis for full liability for a crime, "it shall not be punished so fully, but it is still punishable." Hence, within his framework, "the false alliance or binding by oath, is but a farther degree of conspiracy, which is all one, and synonymous with confederacy, and of which the assembly and consultation is a sufficient fact." That is, Widham's 'confederacy' for Twisden is but a form of intent or plot revealed by the assembly.[1172]

5.2.3 The Brewers as Having Committed an Assembly to Some Unlawful Public Purpose

If within the above interpretation the unlawful assembly works as evidence of a punishable intent, within the domain of constructive treason the relationship reverses and the intent becomes the determinant element in turning an assembly into an unlawful one. Earlier, I defined assembly as used in this domain as a 'meeting of people to some purpose' which can be indeed to deliberate between them a course of action, or to take immediate action. Such assemblies could be considered illegal depending on their *manner* and their purpose. With regards to the latter, the same sort of conduct would amount either to an act of levying of war or simply to a mere public disturbance under unlawful assembly and riot depending on whether the purpose of such assembly or meeting of people was public or private. Now, this domain was evoked by the information, and thus the court engaged in an argument as to whether the conduct of the brewers was treasonous or not.

Thus, it was objected by the defense that "this is only against private men, and not punishable at the King's suit, but by suit by the parties,"[1173] because it was found by the jury "only that they did factiously and seditiously assemble and conspire to depauperate the fermors; but it does not say in the excise, which being incertain… are not to be made good by intendment."[1174] The counsel for the king argued that it was "an inevitable consequence that the King must lose his rent where his fermors are depauperated; and although it may

[1172] 1 Keble 675, 676; 83 ER 1179, 1180.

[1173] 1 Lev 125, 83 ER 331.

[1174] 1 Keble 655, 83 ER 1167-8.

mitigate the matter, that the particulars are not found, yet it remains a great offence, and of publick concernment."[1175] He further argued that "the jury have found it seditiously done, which cannot be in cases of publick concernment."[1176]

Then it was also argued that "to assemble his friends for his defence against H. that lay in wait in passage to the market, was held unlawful, although to a lawful end."[1177] This argument not only mapped onto the domain of treason, but also built onto the domain developed from the problem presented by these assemblies with were fell short of having either direct or indirect purpose of levying of war, or were not *more guerrino arraiati*, but which, by their number, could be construed as being treasonous. That is, it entailed the idea that numbers may provide even a greater threat of force than a smaller but armed group.

Furthermore, the counsel argued that "in Midwinter against Scrogg in the Star-Chamber… the butchers of London were fined 3000l. for glutting the markets, to the impoverishment of several country fermors, because it was of publick concernment, and consequence."[1178] This argument, indeed, partly plays onto the entailment that being tax farmers, anything affecting them affected the King's revenue, and therefore it was public. However, it also partly mapped onto the domain of unlawful trade agreements, and collective action such as monopolies, forestalling, etc. Indeed, the counsel also argued that "the very conspiracy to raise the price of pepper is punishable, or of any other."[1179]

The Court was also divided as to whether there was unlawful assembly only or whether the action amounted to something else. Keeling adhered to the argument that "whatever concerns the King's revenue is publick." Windham agreed that "had the persons been found guilty of the whole declaration, they should have been ransomd rather then (sic) fined, because it tends to rebellion."[1180] He believed though, that the purpose of the brewers was private only, and that the fact that the farmers were publick officers did only aggravate

[1175] 1 Keble 655, 83 ER 1168.

[1176] 1 Keble 655, 656; 83 ER 1167.

[1177] 1 Keble 655, 656; 83 ER 1167, 1168.

[1178] Ib.

[1179] 1 Keble 560, 83 ER 1164.

[1180] 1 Keble 675, 83 ER 1179.

the offense, but it did not make it a different one. Indeed, as mentioned above, for Windham, the offense was an illegal association or confederacy, and within this framework, "their assembling together, their consultation and conspiracy… is as much a false alliance, as if they had bound themselves by oath."[1181] Thus by conspiracy he means 'association or alliance,'[1182] which he takes to be synonymous with *confederacy*. Twisden agreed that "this impoverishing of the fermors, doth implicitly find the diminishing of the Kings revenue, as said earlier," but he did not consider the assembly to be the offence but the overt act proving the punishable conspiracy. Finally, Hyde straddled between the two of them, and argued that "such assemblies are punishable because prohibited by law, although no other act done."[1183]

5.2.4 The Category of Conspiracy after Starling (Towards the Category of Criminal Conspiracy)

The blended structure between the crime of the will and high treason, that is, the idea that a crime of the will is punishable as long as it has been revealed by an overt act, began to be projected onto the category of conspiracy, shaping its form and making it a type of crime of the will along with treason. For instance, in *Rex v Opie and Dodge* (1671), a case of embracery of jurors, the information had been framed in the following way:

> [the defendants] contrived, conspired, and among themselves unlawfully agreed, by rewards and other ways and means, unlawfully to procure a verdict to be given for the defendant: and to perform their said most wicked intentions, contrivances, and conspiracies…[they] agreed that the said Stephen Trehance and Edward Dodge, for divers sums of money… should procure themselves… to be sworn de circumstantibus for the trial of the said issue, and should give a verdict for the defendant. And according to the said agreement… by unlawful ways and means, procured themselves to be sworn de circumstantibus for the trial of the said issue; and being so sworn, together with the other jury sworn to try the said issue, then and there gave their verdict for the defendant.[1184]

This information alleges two main offenses: a procurement of false verdict upon a "plea of trespass upon the case" by conspiracy, and the very embracery. The first offence was not within the writ of conspiracy in a narrow sense, although the way it was worded recalled the writ. But the important thing is that the facts of the information had been mapped

[1181] 1 Keble 675, 676; 83 ER 1179, 1180.

[1182] 1 Keble 650, 83 ER 1164.

[1183] 1 Keble 675, 676; 83 ER 1179, 1180.

[1184] 1 Wms Saund 300, 85 ER 418.

onto the frame of the punishable plot to commit the said embracery, and then the embracery appears as an execution of that plot, which could be considered indeed as an overt act. Thus, the information allowed for two possible interpretations: as an act of embracery, of which the plot would amount to malice or intent, or as a punishable plot or intent, revealed by the embracery. Indeed, the reporter ambiguously described it as an "offence in the nature of embracery,"[1185] suggesting perhaps that, though the form was that of conspiracy, the substance of the factual basis of the case entailed embracery. But the mappings between conspiracy and unlawful assembly, as they were being shaped in *Starling Case* and the *Poulterers' Case*, took different shapes, forms, and flavors, that is, the facts that were interpreted or framed according to these cases varied in their nature, resulting in a series of mappings of the kind 'x is a conspiracy.' And it should always be understood here that 'conspiracy' was now partly structured as a punishable plot, that is, as a crime of the will (or maybe mind or thought). In other words, this new structure of 'conspiracy' made it a specifically fruitful metaphor to understand other situations, many of which were not sanctioned as crimes by any law, neither statutory nor at common law. Many of these situations had nothing to do with the scheme of the false accusation.

5.3 Punishable Plot Frame

5.3.1 Blackmail as a Punishable Plot

In talking about the action on the case, we have seen how the public reputation of individuals emerged as a sphere of life to be protected both by the law of slander and by the action on the case which protected people from legal slander. Among the many behaviors that could be a cause of discredit of a person, sexual intercourse outside procreation and marriage was one of the more salient in this period. Furthermore, since sexual intercourse was indeed not only a matter of the morals of the community but also of public regulation, the protection of public reputation involved also the protection of the innocent. In other words, since sexual intercourse involved the commission of ecclesiastical offences, and the attachment of civil consequences, the vindication and remedy of one's sexual reputation was at the same time the protection of the innocent against legal oppression.

[1185] 1 Wms Saund 301, 85 ER 419.

The vindication of one's reputation is indeed an indication of how important this issue was for social life. Thus, it is not strange that some people felt tempted to use this to their advantage. That is, those suspicious of illicit sexual intercourse could always try to blackmail and extort money from their victims, who would face not only public disapproval but also legal sanctions. The problem was how to conceptualize and frame such practices within the existing legal framework. Here two analogies appeared. If the blackmail had been executed, and the party was innocent, the case would have resembled that of an action on the case. Thus, the damages would be the cause of action. If, however, the blackmail had not been executed, and there was some form of complicity involved, the offense could be reframed as a punishable plot to falsely accuse someone.

5.3.1.1 Timberly Case (1663)

In this case the defendants were charged with having indicted someone "with having carnal knowledge of a woman, and did so, and that the child she went with was H.'s,"[1186] with the intent to "deprive the plaintiff of his credit, and to extort several sums of money from him,"[1187] probably at the Sessions. That is, they were charged with the offence of fornication punishable by ecclesiastical courts by Cannon 109, and by 13 Edw 1 st 4, and with the charge of bastardy which by 18 Eli c3 was a matter of the JPs' jurisdiction, who could hold parents liable to punishment and to the maintenance of the children, which otherwise would be chargeable to the parish. The determination of bastardy was indeed an ecclesiastical competence: it was certified to common law courts so that they could proceed in matters affected by the status of bastardy such as inheritance, or in this case, the maintenance of the children.[1188]

The defendants moved to quash the indictment, arguing that this "was matter not within the conusance of this Court." Thus, this objection could refer both to the fact that defamation for fornication was triable in ecclesiastical courts only, and also that the determination of bastardy belonged to that jurisdiction. It followed that abuses related to those matters belonged to ecclesiastical courts only. By analogy with the action for words,

[1186] 1 Keble 203, 83 ER 900.

[1187] 1 Keble, 254, 83 ER 930.

[1188] 1 Burn Eccl 116.

the Court disagreed because it argued that though these were ecclesiastical matters, there was a civil damage in that the father would be chargeable,[1189] and "cest Court ad conusance de chescun illegal chose per que damages poit de veign al party come icy poit."[1190] Furthermore, Foster opined that "if it be to do an act unlawful, the very conspiracy is a crime," and Twisden that the inquiry of "omnibus coagulationibus" was part of the articles of the peace. The charge was found and then the defendants moved again in arrest of judgment that this was a matter ecclesiastical and that "as Poulters case, by the common law, no conspiracy lay till after acquittal; but doth now lye for a conspiracy to indict; but it must be such as may draw the party in peril."[1191] The court disagreed. Windham J. said that "the crime is the conspiracy, which whither it be only to defame, or disgrace men, or had it been to charge him with heresy, it had been punishable by common law, though no prosecution be had thereon." Twisden J. opined that "this is no indictment for having a bastard, which is seldom, but it is a conspiracy for lucre and gain, to discharge one with a bastard, which is well actionable." And Foster J. believed that "the very act of conspiring is so odious, for the ill consequences, that it cannot have good intent."[1192]

The main issue in this case, therefore, was whether an indictment lies for a conspiracy to indict of trespass before ecclesiastical jurisdiction. Although this matter had been positively answered in 29 Edw 1 as it appears in 2 Inst 562, this authority was not cited in court. Instead, the strategy had been to draw an analogy (see below) with the action on the case, and with the precedent of the *Poulterers' Case*.

The second analogy was drawn with regard to the *Poulterers' Case* precedent. In that case, it had been held that conspiracy was punishable before execution. And the sense of conspiracy there was that of 'plot', which in turn blended with murder and the doctrine that the will must be taken for the deed. In that case, the offense was the plot to falsely indict somebody without regard to the result of the accusation; in this case, the analogy was that there was a plot to accuse somebody without regard to the nature of the accusation. Yet,

[1189] 1 Keb 203, 83 ER 900.

[1190] 1 Syd 68, 83 ER 974.

[1191] 1 Keble 254, 83 ER 930.

[1192] 1 Keble 254, 83 ER 930-1.

implicit in the *Poulterers' Case* mapping with murder and the doctrine that the will must be taken for the deed was the idea that what was punishable was the intent to cause the death of an innocent, and therefore that the accusation was of felony. However, in *Timberly Case* there was not a murderous intent, but rather a tortious one, since the alleged purpose was to defame and extort the defendant. Thus, this case foreshadows a further blending between the *Poulterers' Case* precedent and the action upon the case in the rule that a plot to damage someone is punishable without regard to its execution.

5.3.1.2 Armstrong's Case (1678)

We have seen how in *Timberley Case* the main issue was whether common law courts had jurisdiction over indictments of ecclesiastical offences. The point was argued in two ways, and one of them was an early mapping onto the *Poulterers' Case* and the frame of the crime of the will or crime of intent. The Court had jurisdiction because it was a punishable plot. However, there was no further discussion as to whether the overt act requirement applied or not.

In *Armstrong Case* (1678), the accusation was that the defendants had conspired "to charge one with the keeping of a bastard-child, and thereby also to bring him to disgrace."[1193] Thus, the defense moved in arrest of judgment that "the bare conspiring, without executing of it by some overt act, was not subject to an indictment according to the Poulterers' case."[1194] The missing overt act here was "that he was actually charged with the keeping of the child… [though] 'twas but a pretended child, neither was he by warrant brought before a justice of peace upon such account." That is, there was no actual prosecution by pressing charges against the person wrongly accused. In other words, the defense was also mapping his argument onto the writ of conspiracy frame where there was an acquittal requirement, that is, that there was a false indictment. The Court, however, did not allow the point to stand because "there was as much an overt act as the nature and design of this conspiracy did admit, in regard there was no child really, but only a contrivance to defame the person, and cheat

[1193] 1 Ventris 304, 86 ER 196; notice that the indictment was also framed as 'plot' to defame.

[1194] Ib.; notice how *Starling Case* was beginning to shape the emerging category of conspiracy so as to map onto the *Poulterers' Case*.

him of his money, which was a crime of a very heinous nature," suggesting maybe that the meeting and consultation were enough overt act of this plot.[1195]

5.3.1.3 Best Case (1705)

These interpretations came together in *Best Case*, where there was an indictment for conspiring to charge a man with the filiation of a bastard child. The indictment averred that the defendants:

> Malorum nominum, &c et compassantes devisantes et inter se conspirantes how to cheat the Queen's subjects of their money… falso nequiter et astute machinantes intendentes et inter se conspirantes… non solum de pecuniis suis decipere, et eundem P. in maximum scandalum, contemptum, et infamian, apud omnes ligeos et subditos of the Queen inducere…. falsò, illicite, deceptive, malitiose, et ex inqui lucre causa inter se conspiraverunt, machinaverunt, consultaverunt, et agreeaverunt, falsò, injuste, nequiter et diabilice ad onerandum et accusandum praedictum P. esse patrem infantis, unde praedicta E. E. one of the defendants tune gravida fuit… P tunc nuper praeantea habuisset carnalem cognitionem corporis ipsius praefatae Eliz. E. et ipsam preaefatam E. E. carnaliter cognovisset… ac quod pro ulteriori executione… inter se agreeaverunt et conclusere, quod ipse praedictus B. ad praefatum P. accederet, et eundem P. accusaret…quod praedictus Best in executione praemissorum, ac secundum praedicta conspirationem, consultationem, et agreeamentum… onerabat et accusabat praedictum P… ad grave damnum, scandalum, et defamationem praefacti P.[1196]

Thus, this indictment evokes several possible frames of understanding as to what the legal nature of the facts of the case could be. The concept of 'false indictment' called for the 'writ of conspiracy' frame. The allegations as to the nature of the offence falsely indicted, 'fornication' and 'being the father of a bastard' referred to the precedents of 'false indictment of ecclesiastical offense.' The terms used to refer to a 'plot,' (*compassantes, deivantes, conspiraverunt, machinaverunt, consultaverunt, agreeaverunt*) along with the executory clauses (*ac quod pro ulteriori executione, in executione praemissorum*) *ac secundum*, evoke the crime of the will frame (plot-overt act). The former terms can also evoke the frame of 'assembly' and that of 'alliance.' The intent to 'slander' (*de bono nomine fama statu et credential suis deprivare*) and 'to cheat or fraud by collusion' (*de pecuniis suis decipere et*

[1195] Ib.; (86 ER 196) (Cf. with Daniell (1704). Later Holt would express the opinion that "a conspiracy to charge one with bastard child is indictable, but if one should advise another to do it without more, it would not." (6 Mod 99, 100; 87 ER 856, 857).

[1196] 2 Ld Raym 1167, 92 ER 272; also 6 Mod 186, 87 ER 941; 1 Salked 174, 91 ER 160.

defraudare), along with the allegation of such damages (*ad grave damnum, scandalum, et defamationem*) evoked the frame of the 'action on the case in the nature of conspiracy."

In contrast, the defense argued by framing the indictment against the domain of the crime of the will, arguing that "this indictment is grounded merely upon the conspiracy to charge falsly; and this conspiracy with the subsequent false affirmation, is sufficient to maintain the indictment within the express resolution of *The Poulterers' Case*." The defense followed suit and pleaded the overt act requirement since "it does not appear that any thing was done in pursuance of the conspiracy, and that also ought to appear, according to The Poulterers' Case."[1197] Indeed, as said earlier, the *Poulterers' Case* admitted both understandings since it was framed both against the crime of the will frame as well as against other frames in which conspiracy did not mean plot-intent. And the overt act requirement was only manifest when framed against *Starling Case*.

Holt built his interpretation against these other frames, particularly that of the Definition of Conspirators, arguing that "here is a confederacy to charge a man falsó, nequiter, malitiosè, &c. and though the word confederaverunt be not in, yet there are the words machinaverunt et aggregaverunt, which are as full." He then went on to say that "a formed conspiracy, strictly speaking… will not lie until acquittal, or and ignoramus found… but this seems to be a conspiracy late loquendo, or a confederacy to charge one falsly, which, sure, without more is a crime," adding that "if in an indictment for such confederacy you proceed further, and shew a legal prosecution of the confederacy, there you must show the event thereof, as "ignoramus" returned on the indictment, or an acquittal… but where you rest upon the confederacy, it will be well without more." Thus, framed against the Definition of Conspirators, and the articles of enquire and all other sources cited by Coke in the *Poulterers' Case*,[1198] the meaning of *conspiracy* was that of 'alliance,' signaled by the word

[1197] Lord Raymon reports that "it did not appear, that any thing came of this conspiracy, and bare conspiring to do an ill thing by another is not criminal, unless the thing to be done; for it is the damage the party receives by the conspiracy, that makes it criminal," 2 Ld Raym 1167, 92 ER 272, framing on the action on the case. Thus, the defendants further argued that "unless the prosecutor by his accusation were like to be subjected to some penalty, the indictment will not lie," 2 Ld Raym 1167,1168; 92 ER 272, 273, to which it was replied that "a false conspiracy, without further act of pursuance, is indictable," 6 Mod 186, 87 ER 941.

[1198] Thus, Salkeld reports the Court opinion that "confederacies are one of the articles in the commission of oyer and terminer, to be inquired of, "1 Salked 174, 91 ER 160.

confederacy, which acquires here a more general meaning, leaving the term *conspiracy* for the frame of the action of conspiracy (or the writ of conspiracy).

Thus, the Court decided that "the defendants were charged at least with a conspiracy to charge the prosecutor with fornication. And though that was a spiritual defamation, the conspiring to do it was a temporal offense and indictable,"[1199] because "agreeing together to charge a man with a crime falsly, is a consummate offence, and indictable,"[1200] and therefore, "the confederacy is the git of the indictment."[1201]

5.3.1.4 Kinnersley Case (1705)

This was a case in which the blackmail involved the threat of revealing homosexual intercourse. Thus, the indictment was framed as a punishable plot of the defendants who would,

> in order to extort money from [the prosecutor] … did conspire together to charge [him]… with endeavouring to commit sodomy… and in execution of this conspiracy they did in the presence of several persons falsely and maliciously accuse my lord, that he conatus fuit rem veneream habere with the defendant… and so to commit sodomy.[1202]

Thus, it was objected by the defense that "bare words are not a sufficient overt act, without alleging something actually done towards putting the conspiracy in execution."[1203] That is, in this case, the conspirators had not pressed any charges of sodomy against anybody, but had only revealed it in public. The prosecutor replied that "there was no occasion to lay any [charge]. The conspiracy is the git of the charge, and the other only matter of aggravation, of which the defendant may be acquitted, and found guilty of the conspiracy

---

[1199] 2 Ld Raym 1167, 1169;92 ER 272, 273. Cf. 6 Mod 186, 187; 87 ER 941, 942: "it is a conspiracy to charge one falsly with fornication, which, though it be no crime at common law, is punishable in the Spiritual Court."

[1200] Paraphrased in the opinion as "a confederacy falsly to charge with a thing that is a crime by any law is indictable," 6 Mod 186, 187; 87 ER 941, 942.

[1201] 6 Mod 186, 187; 87 ER 941, 942. Cf. Lord Raymond: "the conspiracy was the gist of the indictment… the Chief Justice said, that confederacies were one of the articles in the commission of oyer" 6 Mod 186, 92 ER 272; Salkeld's report also hinted at an 'assembly' rather than an 'alliance': "several people may lawfully meet and consult to prosecute a guilty person; otherwise if to charge one that is innocent, right or wrong, for that is indictable" 6 Mod 186, 187; 87 ER 941, 942. Cf. with Holt's obiter that "people may lawfully meet, and contrive and agree to charge a guilty person," 6 Mod 186, 84 ER 941.

[1202] 1 Stra 193, 93 ER 467; for an early case of a conspiracy to commit sodomy see *Blood's Case*, Raym T 417, 83 ER 218.

[1203] 1 Stra 193, 93 ER 467.

notwithstanding."[1204] And in support of this proposition he mentioned that "a conspiracy to charge a man with being the father of a bastard child was held well laid, without any overt act."[1205] Thus, in this case the defense subscribes to the alternative interpretation of the *Poulterers' Case* that a plot is punishable without overt act, relying on the precedent of *Timberly's Case*. But the interesting thing is that the aggravation argument. This argument had been evoked in the cases of cheats as a way of disregarding the allegations of collusion (or conspiracy) as not being substantive for the case by contrast to the cheat—[1206], but here it was an argument to disregard the actual behavior (the overt act of denouncing someone as having committed sodomy) by contrast to the conspiracy. The court dismissed all the objections.

5.3.2 Cheat and Fraud by Collusion as Punishable Plot

In *Paris Case* (1670) (2 Keble 572, 84 ER 360), the defendant had obtained a judgment of debt by cheating a woman into signing a warrant of attorney and a release of errors for a supposed action of debts owed to him under the pretense that the document she was signing was intended to better help her to marry a wealthy man. Then an information was brought. The reports of this case do not agree as to how to qualify the information, which is described either as conspiracy[1207] or as "un cheat."[1208] By contrast, Ventris reports the information as if it were against Paris only, "for that he faudulenter & deceptive procured one… to give a warrant of attorney to confess a judgment."[1209] Probably, as we will see later, there were both allegations of a conspiracy[1210] and a cheat.

What that case hinted at, but did not explicitly say, appears expressed in the indictment of *Thody's Case* (1673), which put forward that the defendants "conspiratione

[1204] 1 Stra 193, 194; 93 ER 467, 468.

[1205] 1 Stra 193, 195; 93 ER 467, 469.

[1206] See below.

[1207] 2 Keble 572, 84 ER 360.

[1208] 1 Sid 432, 82 ER 1200.

[1209] 1 Ventris 50, 86 ER 35.

[1210] The information was brought indeed against "Paris et alios", 1 Sid 432, 82 ER 1200, suggesting that there were more people involved in the scheme.

inter eos habita, they enticed J. S. to play, and cheated him with false dice."[1211] This formula, indeed, was discernibly built in analogy with the writ of conspiracy, particularly the *conspiratione* clause and the Year Books' cases, but alleging forgeries and deceits instead of a false accusation. This mapping facilitated the drawing of inferences from the structure of the writ of conspiracy.

So, did the defendant in this case who pleaded the plurality requirement in a motion in arrest of judgment since judgment had been entered against him while the other defendants had not yet been arraigned. Hale initially drew an analogy with the rule that "if one be acquitted in an action of conspiracy, the other cannot be guilty: but where one is found guilty, and the other comes not in upon process, or if he dies hanging the suit, yet judgment shall be upon verdict against the other." His distinction was between plurality requirement in the case of acquittal of one party, and in the case of conviction of one party before the rest have pleaded to the indictment. Wylde Justice, by contrast, opined that the plurality requirement did not apply in this case because "the difference was, where the suit was upon conspiracy wherein the villainous judgment was to be given, and where the conspiracy is laid only by way of aggravation, as in this case." That is, this was not a case of conspiracy but rather one grounded on the cheat. Then Hale said that the opinion that plurality applied to acquittal—meaning that the acquittal of one implied the acquittal of the rest—but not to conviction of one defendant before the rest have pleaded "would be the same in an action against two upon the case for conspiracy; but not in such actions, where tho' there be a charge of conspiracy, yet the gist of the action is upon another matter"[1212] This implies that such actions are not grounded on conspiracy and therefore the plurality requirement does not apply.

In any case, the important issue here is that the situation described in the cause of action was interpreted in at least two ways, each of them corresponding to the mapping onto some form of action or precedent, or legal concept. Thus, if we start with the concept of 'aggravation,' and the situation 'cheat', and the frame of the action on the case of conspiracy (or perhaps the writ of conspiracy modified), the cause of action becomes one of cheat by collusion, where *conspiracy* means collusion. A similar use of the frame appears in the

[1211] 1 Ventris 235, 86 ER 157.

[1212] Ib.,

grounds of accusation of the case of *King vs Salter* (1685), where the indictment alleged that the defendant "being an evil man, &c. and conspiring to aggrieve one Land, pretended that he had broke his arm, and accordingly counterfeited the same, and upon presence to seek his living by any labour, and exhibited a complaint against him to the justices of the peace."[1213] In this case, the cause of action lay on a fraud to cheat the local authorities to claim poor relief, and the allegation of conspiracy appears as 'collusion,' or the means by which the fraud is carried out. Thus, conspiracy is not the cause of action but an aggravation of the cheat. In other words, a collusion is not wrong in itself but rather something that aggravates the wrong of cheating. That means that it appears not as an element of the fraud or cheat that would still exist without the collusion.

If we start with the framework of the writ of conspiracy, then there cannot be a cause of action, since there is no procurement of false indictment but only a cheat. Besides, the plurality requirement is projected onto the situation, and therefore there cannot be an acquittal of one only (though it seems that the Court was inclined to consider the possibility of a conviction of one before the others had been charged). But this framework was susceptible of new interpretations.

Thus, in *Thorp's Case* (1697), the cause of action was that the defendants "wickedly, unlawfully, and deceitfully, conspire… to take one… being under age of eighteenth years… to carry him out of the custody of his father, without his notice, and against his will, and to marry him to… a person of ill name, and of no fortune." Then the defendants had "unlawfully assembled themselves together to accomplish the said conspiracy and wicked intentions," after which they

> by divers false, malicious, and deceitful insinuations, did falsely, unjustly, maliciously, and deceitfully persuade the said [young man]… to hate his father… and did unlawfully and deceitfully, by false speaches, persuade and solicit him to be married to her… by divers false assurances and promises, solicit, invite, and procure [the young man]… to leave the said school, against the will and without the notice or consent of his father, and did receive, maintain, and keep him, with an intent to persuade him to marry the said [defendant].[1214]

[1213] 2 Show KB 456, 89 ER 1038.

[1214] 5 Mod 221, 87 ER 620.

The situations described in this information could be paraphrased as cajoling a young man into marrying a woman of no wealth, and doing so without the knowledge or consent of his father. Though the cause of action does not correspond exactly to a fraud or cheat by collusion, there are elements in the information that allow the framing of it in that way, such as the adverb *deceitfully*, the adjective *false*, and *conspiracy*. In addition to this, there is a 'plot,' and also an 'unlawful assembly' with that purpose. Thus, the cause of action can be framed either as a fraud or enticement by collusion, as an act against the *patria potestas*, as a crime of the will, or as an unlawful assembly. Of these, we are concerned with the following mappings:

5.3.2.1 Conspiracy as Procurement of False Accusation

One of the strategies of the defenses in cases of collusion is to partially map *conspiracy* onto the frame of the writ of conspiracy and draw the inference that the defense of plurality requirement applies: "it is laid by way of conspiracy, and the defendant Thorp being only found guilty, there can be no judgment against him, because one cannot conspire." Likewise, it was argued for the defendant that "every act which is laid to be done by them is in order to accomplish a joint intention… so that all being acquitted but Thorp, the verdict has falsified the information; for one cannot conspire."[1215]

5.3.2.2 Conspiracy as Fraud by Collusion

The replication to this argument on the part of the prosecution was drawn by mapping this case with the abovementioned precedents of fraud by collusion, to infer that the rule applied that "it is not only an information grounded upon a conspiracy, but it is laid by way of aggravation in the beginning." The same conclusion that "notwithstanding these words *per conspirationem* (italics are mine), &c. it was an action on the case, the substance whereof was the illegal arresting the plaintiff, and not the conspiracy" was drawn by mapping this case onto the action upon the case frame of *Skinner v Gunton*.

5.3.2.3 Conspiracy as Scheme to Defraud

This frame is not the basis of any argument, but it is clearly present in the way the facts of the case were framed into the information. Thus, the information is partially mapping

[1215] 5 Mod 221, 87 ER 620.

the facts onto the precedents of *Starling Case* and *Poulterers' Case*, and integrating these into the frame of conspiracy. So, the 'conspiracy with the purpose of enticing the young man to marry someone without the consent of the father' maps onto the 'plot,' and the unlawful assembly to that purpose, and the diverse acts in execution of the plot, are mapped onto the 'overt act.' Furthermore, these precedents are structured according to the mappings that intent is force, and plot is intent, and therefore ultimate cause. And then the rule that intent is punishable if revealed to the world, from that frame of punishable plot is applied. Thus, within this frame, the cheat no longer appears as a collusion. Therefore, in the resulting blend *conspiracy* appears as a 'scheme or design' that is to be put into execution.

The same mapping appears in an *obiter* by Holt Justice in the case of *Macarty* (1705). This was a case of a fraud in which a broker and a wine-merchant had defrauded another of his goods by selling him an adulterated beer under the pretense that it was Portuguese wine. Though this was the cause of action, Holt J. argued that they had also committed "a combination to cheat,"[1216] giving thus way to use of the term *combination* as a scheme to defraud.

And it also appears in a case of false accusation of ecclesiastical offence as we will see in short, which could be framed as a "contrivance to defame the person, and cheat him of his money."[1217]

5.3.3 Duels as Punishable Plot

Another domain which could be projected against the frame of the punishable plot was that of the duels that could be seen as act in execution of a murderous intent. Thus, in *Britton Case* (1703), the indictment was that the defendants:

> Unlawfully, clandestinely, devilishly, and maliciously… consult, machinate, propose and intend, and did among themselves…. Confederate and conspire, and each of them did machinate, propose, and intend to beat, wound, and evilly treat the said William Colepeper… either by Duel or Assasination, feloniously and maliciously to kill and murder.[1218]

[1216] 6 Mod 302, 87 ER 1040.

[1217] *Armstrong Case (*1678) 1 Ventris 304, 305, 86 ER 196, 197.

[1218] 8 ST 178.

From this point of view, the rest of counts of the indictment alleging the challenges and assault against their victim that the defendants had been involved in became actions in execution of this murderous intent, or, as the Counselor for the Queen put it "they are all several Overt-Acts of the Conspiracy:"[1219]

> Nathaniel Denew, with Force and Arms, and lying in wait of his Malice, Fore-thought, and Assault premeditated… offered himself to fight a mortal Duel… against the said William Colepeper… Richard Britton, with Force and Arms, Malice, fore-thought, and Assault premeditated, and then and there offered himself to fight a mortal Duel… and that the said Nathaniel Denew, and John Merriam…. With Force and Arms, with Malice, Fore-thought, by lying in Wait, and premeditated Murder, assaulted him the said William Colepeper; and with drawn Swords, sharply, cruelly, and with all their Strength, tried, and long contended, to wound, kill, and murder him.[1220]

Thus, during the trial, the defense observed that "the Indictment is laid several Ways: Besides the Confederacy, they charge us with particular Offences in Challenging…they say they entered into a Conspiracy, to consult and contrive how they might do a Mischief to Mr. Colepeper," and he argued that "they have endeavour'd to support a Conspiracy: and if they fail of the Proof of it, they know their whole indictment fails,"[1221] suggesting that the grounds of the accusation lay on the conspiracy rather than the challenge. Indeed, he went on to say that "suppose that there should be some warm Words between Gentlemen, and those Words indictable, unless there be some Things premeditated in order to bring pass such Conspiracy?" Thus, since "they have not produced any Evidence whatsoever, that Mr. Britton, one of them, ever spoke to, or saw the other two… there can be no manner of a Conspiracy." Furthermore, since it was proved that Merriam retired, it was clear that "Mr. Denew is alone in the Conspiracy: he conspired by himself and there must be Three to make it a Conspiracy."[1222] The jury found the defendants not guilty of the conspiracy, and guilty of other counts of the Indictment.

The interesting thing in this indictment is its dual construction. On the one hand, framed against the crime of the will, it alleged a punishable plot to cause someone to die by

[1219] 8 ST 178, 193.

[1220] 8 ST 178-179.

[1221] 8 ST 178, 193.

[1222] Ib.

dueling with him rendered manifest through the actions of challenging him to duel, and trying to engage in such duel or assault. On the other hand, as pointed out by the defense in the passage above, the plot became evidence of the mental elements of these offenses of assault and the challenge (malice aforethought, assault premeditated), or as the defense counsellor put it, "suppose there should be some warm Words between Gentlemen, are those Words indictable, unless be some Things premeditated in order to bring to pass such a Conspiracy?"[1223] That is, these words become a challenge to duel with the purpose to cause someone to die in the light of the previous plot of which they are the execution. Unless there is malice premeditated, insulting and challenging words cannot be considered as an offence. In other words, it could be framed as a plot to kill somebody by dueling with him that was put into execution (in which case *conspiracy* means a plot which is punishable) and therefore revealed to the world by an assault and a challenge to duel, or it could be framed as an assault and challenge to duel that has been premeditated (in which case *conspiracy* still means 'plot,' but no longer as the crime itself but merely as further evidence of malice aforethought).

5.3.4 Enticement as Punishable Plot

In the case of *The Queen against Daniell* (1704), we have an interesting example of how the mapping onto *Starling* was used to draw legal arguments. This case was one of indictment of enticement against one for "à shopà et domo, et à servitio praed. Joseph discedere, et seipsum absentare procuravit, allexit, persuasit, et causavit."[1224] But there was no evidence that the servant left service, and that there was a breach of contract, but only that the prospective employer had a beer with him, persuading him to leave employment. Thus, drawing an analogy between the meeting and persuasion and conspiracy or plot and unlawful assembly to plot in *Starling*, the defense excepted that "in no case is the bare giving advice, or endeavoring to persuade one to do an ill thing without more, punishable," though "if several conspire and confederate together to do an ill thing, though nothing more be done, it will be indictable, because the meeting together in order to such confederacy is unlawful," because "the rule is *non oficit conatus nisi sequitur effectus*."[1225]

[1223] 8 ST 178.

[1224] 6 Mod 99, 87 ER 856.

[1225] 6 Mod 99, 87 ER 856.

Furthermore, he mapped onto *Cockshall Case*, and argued that "if a freeman of a corporation endeavor, intend, or conspire with others, to do acts that tends to the prejudice of the corporation, yet if there be no act done, it is no good cause of disfranchisement, nor of indictment; a fortiori, it will not be a good cause here, where the endeavor is only to the prejudice of a single person in one particular instance." This last clause also refers to *Starling*, where "it was an indictment for meeting and conspiring together how to impoverish the farmers of the excise; and the reason why that was held indictable was, because such thing would affect the publick revenue."[1226]

In this way, the enticement was framed in two different ways. As against the punishable plot frame it was a plot or conspiracy between two, but it followed that since there was no overt act it was not punishable. As against the unlawful assembly, it was a meeting between two, but it was not punishable because it had a private rather than a public purpose. Holt C. J. agreed that "it two or more confederate and agree to indict a man of a crime of which he is not guilty, the very meeting and agreement is an ill and unlawful act, but not indictable perhaps." He added that if a meeting be to rob or kill, it may be indictable; but even there advising one to rob or kill, without something be done thereupon, is not indictable."[1227] From this it follows that Holt considered the meeting to commit murder or robbery as of public concern, and that likened advising someone to do something to conspiracy or plot. On the other hand, Powell J. opined that according to the *Poulterers' Case*, a "bare conspiracy without more was held indictable."[1228]

5.4 Malicious Prosecution Frame

We have seen how the action on the case grew apart from the writ of conspiracy as the independent frame of malicious prosecution. At first, the focus of the action was on malicious prosecution rather than the old procurement of false indictment, but maybe because of the analogy with slander and vexatious lawsuits the cause of action came to be considered the damages or injury inflicted on the defendant by means of a malicious prosecution,

[1226] Ib.

[1227] 6 Mod 99, 87 ER 856. Cf. with Holt later "a conspiracy to charge one with a bastardchild [sic] is indictable; but if one should advise another to do it without more, it would not; 6 Mod 99, 100, 87 ER 856, 857.

[1228] 6 Mod 99, 100; 87 ER 856, 857.

particularly slander and vexation. Then the question arose: if slander (by malicious prosecution) was the cause of action, could a slander by mere accusation (of ecclesiastical) offense be punished by conspiracy?

There are clear signs to suggest that lawyers drew analogies on malicious prosecution to frame the indictments for blackmailing as punishable plots to bring false accusations of ecclesiastical offenses. The basis of the analogy was, of course, that accusations of ecclesiastical offences, though not actionable under the writ because they did not charge felony, had been proved to be actionable under the action on the case which admitted accusations of trespass as a cause of action. And the argument went that such accusations of trespass were actionable at common law because the cause of action was the damage to the individual. Likewise, the analogy went that cases of accusation of fornication,[1229] and cases of accusation of sodomy[1230] would be punishable because of their intent to cause damage to the party. This analogy with the action on the case can further be detected in the form of the indictments, which included averments of the intent of the defendants to cause damage both to the reputation and to the purse of the defendant by their accusation.[1231] Clearly, there is no actual damage alleged as in the action on the case, but rather the idea that there was an intent to cause damage to the party. This in turn would lead to the integration of elements of malicious prosecution into the frame of conspiracy as a punishable plot.

5.4.1 Innocence Requirement

In this section, we will see how lawyers framed arguments upon the writ and the action on the case.

[1229] Such as *Timberly's Case* (1663) 1 Keble 203, 83 ER 900; 1 Sid 68, 83 ER 974; 1 Lev 62, 83 ER 29; 1 Keble 254, 83 ER 930; *Armstrong Case* (1678) 1 Ventris 304, 86 ER 196; *Best's Case* (1705) 6 Mod 186, 87 ER 941; 1 Salked 174, 91 ER 160; 2 Ld Raym 1167, 92 ER 272.

[1230] Such as *Blood's Case* (1608) Raym T 417, 83 ER 218, and *Kinnersley and Moore's Case* (1719) (1 Stra 193, 93 ER 467.

[1231] "To deprive the plaintiff of his credit, and to extort several sums of money from him," 1 Keble 254, 83 E 930; "to bring him to disgrace," 1 Ventris 304, 86 ER 196; "in order to oppress and defame… and to get unto themselves unlawful gains of money," 6 Mod 186, 87 ER 941; "de pecuniis suis decipere et defraudare… etiam… de bono nomine fama statu et credential suis deprivare… in maximum scandalum, contemptum, et infamiam, apud omnes ligeos et subditos of the Queen inducer…. ad grave damnum, scandalum, et defamationem (of the defendant)," 2 Ld Raym 1167, 92 ER 272; "in order to extort money," 1 Stra 193, 93 ER 467.

In all these cases of blackmailing, it seems that there was no indictment or information, or any other formal action, but at best a public imputation. This amounted to slander, and, as said earlier, if the blackmail had been executed, then it would amount to some form of malicious prosecution. But did then the requirement in malicious prosecution that there should be at least some form of prosecution as by pressing charges apply (a requirement that was confirmed in the *Poulterers' Case*)? Did the acquittal requirement apply? To raise these questions, the lawyers had to draw analogies with malicious prosecution and with the old writ of conspiracy indeed. Thus, in *Best Case* there was a false accusation that a man was the father of a bastard, and that therefore he had committed fornication. An analogy is drawn between the acquittal requirement within the frame of *writ of conspiracy* and the fact the indictment did not aver that the defendant "was not the father of it," to conclude that "it was essentially necessary to the maintaining such indictment to aver that the party was innocent,"[1232] because "a conspiracy to charge a man with a fact that is true, is not punishable; and therefore the indictment ought to have said, the prosecutor was not the father of the child."[1233] Obviously, this was not a merely formalistic requirement, since the prosecutor then would have had to prove that he was not the father of the child, which was only determinable by due process of law. Holt Justice agreed that "though a conspiracy to charge falsly be indictable, yet the party ought to shew himself to be innocent, for people may lawfully meet, and contrive and agree to charge a guilty person… here if the defendants had pleaded not guilty, they must have been acquitted; for the order of two justices standing in force, would have concluded Peter Pickering from giving evidence of his innocency."[1234] Likewise, Montague for the defendants argued that "it ought not only to appear that the accusation was false, but that it was before a lawful magistrate; otherwise it could not be a legal accusation," and that "if this were a writ of conspiracy, it would not have lain before an acquittal, and then there would be no need of an averment of the party's innocence, because the acquittal would be tantamount."[1235] The Court decided that "it need not be averred that H. is innocent, for it is said, that the defendant did falsely affirm him to

[1232] 6 Mod 186, 87 ER 941.

[1233] 2 Ld Raym 1167, 1168; 92 ER 272.

[1234] 6 Mod 186, 87 ER 941.

[1235] Ib.

be the father, and innocence is to be intended till the contrary appears;"[1236] and in support of the thesis that averment of innocence was not necessary they cited both *Kimberley* and *Armstrong's* cases.[1237]

Similarly, in a case of false accusation of sodomy, the defense raised in arrest of judgment that "it should appear upon the record, that the party accused is innocent; for it is no crime to charge a guilty person with such an offence… in actions for a malicious prosecution the plaintiff must shew the former action to be determined, and how; so likewise he must shew an acquittal upon an indictment."[1238] Likewise it was argued that "the defendants are justified, till it is falsified in a legal manner, either by ignoramus or acquittal… and the Court will not suffer the party accused to bring this action, till he has manifested his innocence; because otherwise there might be contradictory judgments, for the parties might be condemned in an action for that prosecution, which they might afterwards establish, and then those two judgments would be inconsistent."[1239] The prosecution replied that "it is expressly laid, that the defendant did falsely charge, which could not be, if the accusation was true" And in support *Best's Case* was cited as making good an indictment without averment of innocence though "a difference was taken in an indictment for perjury, where you must aver the oath false; and also in actions for a malicious prosecution, where it must appear the party was innocent, to intitle him to damages."[1240] Since the Court unanimously overruled all the exceptions, these arguments must be considered valid.

However, now the question was not framed as whether the party was acquitted, or whether the accusation had been found groundless by the Grand Jury, but rather whether the party should allege his innocence. The question could be rephrased in contemporary terms this way: is there blackmailing if the accusation is true? For sure, for us it would be so, but since the blackmailing was framed as a punishable plot to falsely indict someone, the question is relevant, since this presumes that the indictment was false. But how can they know that

[1236] 1 Salked 174, 91 ER 160.

[1237] 2 Ld Raym 1167, 92 ER 272.

[1238] 1 Stra 193; 93 ER 467, 468.

[1239] 1 Stra 193, 194; 93 ER 467, 468.

[1240] 1 Stra 193, 196; 93 ER 467, 469.

before there was even some form of prosecution? Or as Holt put it, plotting to accuse someone of something true was not necessarily a wrong. The Courts relied on a presumption of innocence, implying that until prosecution was initiated, verbal accusations were considered to be false.

This also shows how the category of conspiracy was becoming detached from its procedural elements. The writ of conspiracy required the acquittal of the party indicted, the action on the case was grounded on some form of prosecution, and so was the *Poulterers' Case*, but by now there was no need even for the existence of formal proceedings to ground the prosecution for conspiracy.

5.5 Unlawful Assembly Frame

5.5.1 Unlawful Assembly and Cheats

Though the punishable plot is not in the arguments of *Thorp's* case (see above), the mapping with *Startling Case* is active. That is why one of the concepts dealt with in that case serves as rebuttal against the argument that "by the laws of England a young man of the age of fourteen years and upwards may dispose of himself in marriage; and it is no offence to persuade him to marry… the plaintiff ought to shew, that the defendant did solicit or procure his son to be married by some unlawful means. The information is too general; he should have shewed a particular offence."[1241] Thus, mapping the assembly in the information onto the arguments about unlawful assembly in *Starling Case*, the defense inferred the proposition that "that which is lawful for one man to do, may be made unlawful to done by conspiracies… it is lawful for any brewer to brew small beer, but if several shall conspire together to brew no strong but all small beer, on purpose to defraud the king of his duties, such conspiracy is unlawful."[1242] The argument was further refined by the Court in the argument that "it is true, it is lawful to marry, but if it be obtained by unlawful means, it is an offence," implying that enticing and persuading someone can be considered unlawful if done by means of a collusion. Thus, this reverses the idea that a collusion is an aggravation, and made it a part of a cheat (though this is not clearly a cheat, but mere persuasion, which indeed, may be part of a cheat).

[1241] 5 Mod 221, 87 ER 620.

[1242] Ib.

This latter mapping of cheating onto unlawful assembly could explain the Court's argument in a case of cheating *per conspirationem* that the indictment should not be quashed because "that being a cheat, though it was private in the particular, yet it was publick in its consequences."[1243] That is, this case mapped onto *Thody* in that both were cheating *per conspirationem* to invoke the principle as applied to unlawful assembly that something private might have a public purpose or consequence.

5.6 False Accusation Frame

Another element of the frame of the writ of conspiracy was the defense of the plurality requirement. Thus, in *Thody's Case* (1673), the defense inferred from that requirement that "judgment might not be entred against him until the others came in; for being laid by way of conspiracy, if the rest should chance to be acquitted, no judgment could be given against him," to which Hale J. replied that "where one is found guilty, and the other comes not in upon process, or if he dies hanging the suit, yet judgment shall be upon the verdict against the other."[1244] Likewise, the Court in the *Thompson Case* (1688) opined that the acquittal of one is the acquittal of both," (3 Mod 221, 87 ER 142) and the defense in *Kinnersley* argued that "to every conspiracy there must be two persons at least, whereas here is only one brought in and found guilty. If hereafter the other should be found not guilty, that will consequently be an acquittal of [the other]" to which it was replied "this is arguing from what has not happened, and probably never will; for though Moore may have an opportunity to acquit himself, and is not concluded by verdict as Kinnersley is; yet as the matter now stands Moore himself is found guilty, for the conspiracy is found as it is laid, and therefore judgment may be given against one before the trial of the other,"[1245] that is, if conspiracy, meaning the plot, is found, the order in which the defendants are convicted does not matter. This is consistent with the idea that the gist of the action is the plot, and if the acts in execution of it are not found with regard to one of the parties, that party is still guilty of the crime.[1246]

[1243] *Orbell Case* (1704) 6 Mod 42, 87 ER 804.

[1244] 1 Ventris 235, 86 ER 157. A similar argument was raised in 5 Mod 221, 87 ER 620, where it was replied that the conspiracy was an aggravation.

[1245] 1 Stra 193, 93 ER 467.

[1246] Confirmed by *R v Elizabeth Niccolls* (1745) (2 Stra 1227, 93 ER 1148), where one of the defendants had died before trial.

5.7 Hawkins

5.7.1 The Problem of Failed Prosecutions

The last stop in this account of the rise of the modern offense of conspiracy after the Star Chamber had been abolished is Hawkins' *Treatise of the Pleas of the Crown*, which would prove to be very influential. In it, William Hawkins classified this offence within his system as one against the subject: a non-capital, inferior offense that does not amount to an actual disturbance of the peace, committed by common persons, under the infamous and grossly scandalous, proceeding from principles of downright dishonesty, malice or faction.[1247] I will comment on the implications of these classifications later.

As we will see in short, Hawkins sets up his description of the offence partially as a legal argument against the opinion that there was an acquittal requirement for the action by the writ of conspiracy to lie. This formal requirement implied that those prosecutions that failed to secure an indictment were not liable to any action or prosecution because they fell beyond the scope of the writ. As we have seen earlier, the courts developed an action on the case that made these failed prosecutions liable to civil remedy. But the cause of action in this action was no longer the malicious procurement by conspiracy or collusion, but the damages defendants had undergone as a consequence of the prosecution (slander, vexation, imprisonment). Indeed, as mentioned earlier, the acquittal requirement came to be considered as one of the elements that may distinguished the action on the case in the nature of conspiracy from the writ. Likewise, in the *Poulterers' Case*, the Star Chamber had developed a parallel doctrine according to which such prosecutions could be considered plots punishable under the view that they were crimes of the will, as long as they had been put into execution. In other words, the law did not punish the false charge as such but as revealing a murderous intent.

The development of the action and the indictment sparkled a debate as to whether prosecutors ought to be held liable for failed prosecutions. This was a matter of the policy of the law. There were two main camps as to what were the values or interests that the law should protect. On the one hand, there were those who thought that the law should have as a

[1247] See systematic index.

priority the prosecution of crime, and that, therefore, making prosecutors liable to civil damages or to punishment would discourage prosecution. On the other hand, there were those who believed that above all the law should protect the innocent from false imprisonment, vexation and injury to their reputation.

5.7.2 Hawkins' view of the Acquittal Requirement

The originality of Hawkins is that in addition to these remedies, he argues that the offense of conspiracy does not require the acquittal of the party grieved indeed. As will be seen in short, his argument derives from a change in the frame against which he chooses to interpret the cause of action in the writ of conspiracy: the statute 33 Edw I that provided the definition of conspirators as those "that do confeder or bind themselves by oath, covenant, or other alliance."[1248] Thus, he infers that "from this definition of conspirators it seems clearly to follow… those also are guilty of this offence, who barely conspire to indict a man falsly and maliciously, whether they do any act in prosecution of such conspiracy or not; for the words of the statute seem expressly to include all such confederacies under the notion of conspiracy, whether there be any prosecution or not."[1249]

In this passage, Hawkins uses the expression *barely conspire* of the crime of the will frame, meaning the unexecuted intent. However, by the term *conspiracy* he does not mean 'plot.' Instead he frames the term against the definition of conspirators where it means 'alliance' or 'association.' That is why he uses the term *confederacy* as synonym of it. Thus, he paraphrases *barely conspire* as "barely to engage in… an association."[1250] It is this association or alliance that is the grounds of indictment according to the statutory definition. Thus, this frame contrasts with the crime of the will in that the association is rather an external act, punishable in itself without the need of an overt act revealing it.[1251]

This interpretation leads him to conclude that Coke's definition of the offense of conspiracy "whereby the lawful acquittal of the party grieved is required to make the

[1248] 2 Haw PC c 72.

[1249] Ib. s 2.

[1250] Ib.

[1251] Note that since Hawkins chooses here the statute as his starting point defining the wrong, this entails that the source of the wrong is this statute and not the common law as Coke claimed.

offenders guilty of this crime" is wrong. But a hypothetical rejoinder would argue against this point that Coke's definition was consistent with the form of the writ of conspiracy, which did not follow the definition of the Definition of Conspirators. Hawkins, indeed, concedes that that "there is no formed writ of conspiracy in THE REGISTER for a malicious indictment of appeal, but what supposes such indictment to have been actually brought, and the party to have been legally discharged," though he found an instance of such writ brought "against one who had been non-suited in a malicious appeal of felony."[1252]

To overcome this second line of argument based on the settled form of the writ according to the Register, and confirmed by Coke's definition, Hawkins draws an analogy between the writ of conspiracy and the action on the case. Thus, he applies the same analysis in terms of damages to the writ of conspiracy. In other words, by mapping the writ onto the action on the case, he could infer that the damages the party suffered was the cause of action in the writ. Thus, though he found that "a bare conspiracy to indict a man will not maintain a writ of conspiracy at the suit of the party grieved, because it doeth not do him any actual damage," he also believed that "the malicious putting of a man to the unreasonable charge, scandal, and trouble of a criminal prosecution, which is so palpably groundless as not to have probability enough to induce a grand jury to find an indictment, should... be as good a foundation of complaint, and a grievance as much within the meaning of the statute," since there was evidence in the Register that there was a writ of conspiracy for "the putting one to charge and vexation of a groundless action, either in temporal or spiritual court… without making use either of the words acquietatus fuisset, or quietus recessit."[1253]

'Unreasonable charge,' 'vexation,' and 'scandal,' are all concepts belonging to the frame of the action on the case, but here they are suggested as "as good a foundation of complain [sic]" for the writ of conspiracy. Thus, Hawkins is opposing a substantive argument about what the cause of action is in this writ, to a more traditional and formalistic approach based on what the fixed form of the writ had become. This parallels Holt's reasoning in the *Savile Case*. In other words, 'malicious prosecution' came to mean 'damage to person caused by a malicious prosecution,' but the wrong in the form of the writ was the 'procurement of a

[1252] 2 Haw PC c 72 s 2.

[1253] Ib. s 2.

false indictment by conspiracy or collusion.'[1254] The result of Hawkins' mapping is the potential blending of the frames of the writ and the action on the case so that 'private injury' by prosecution becomes the cause of action in both. Indeed, Hawkins later concedes that since "an action on the case in the nature of such writ doth lie for a false and malicious prosecution… and that the same damages may be recovered in such an action as in a writ of conspiracy, it hath been thought needless to inquire, whether such writ may be maintained for such a prosecution or not,"[1255] meaning the failed prosecution without acquittal. In this passage, both actions give the same remedies. But this is inconsistent with Hawkins' former argument that the definition of conspirators set up a 'confederacy to falsely accuse somebody" as the grounds of indictment. As we will see in short, the two grounds will blend into Hawkins' interpretation of the *Poulterers' Case* case-law.

In addition to these arguments allowing to hold failed prosecutions liable to action by the writ, Hawkins also entertained that a confederacy to indict a man is not only within the letter of the statute, but "also within the meaning of it, since it is a high contempt of the law, barely to engage in such an association to abuse it, to serve the purposes of oppression and injustice… so evidently contrary to the first principles of common honesty."[1256] In this passage Hawkins changes gear and reasons in a different way, not in formal terms but in terms of the values that the law seems to protect by punishing false indictments. Indeed, it hints at several possible hypernyms in a system or classification based on the values protected by the offense. It can be though as belonging to the category (or domains) of the 'perversion of law,' or to that of 'oppression against innocent.' Furthermore, here it is suggested that the statute is an expression of the principles of morals or as he puts it, against "the first principles of natural justice" against which the association to pervert the law would be. Each of these focus on different facets or domains of the situation of the false indictment: the dignity of the process of administration of justice itself, and the protection of innocents. In other words, under this interpretation, the coming together to falsely indict diminishes or affects the dignity of justice, and aggrieves the innocent. Yet the focus of Hawkins is no longer on the

[1254] And Coke's definition, as shown earlier, blended the plot frame with the formal elements of the writ.

[1255] Ib.

[1256] Ib. See also s 14.

actual act of bringing a false indictment but on the act of coming together. Under this view, associating or coming together or joining in some purpose could be seen as a criminal activity itself, as in this case, when it is for some unlawful purpose.

After exploring these arguments, Hawkins admits that "it doth not appear to have been solemnly resolved, that such an offender is indictable upon the statute." Then he holds that it is:

> more safe and adviseable to ground an indictment of this kind upon the common law than upon statute, since there can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law; as where divers persons confederate together by indirect means to impoverish a third person, or falsly and maliciously to charge a man with being the reputed father of a bastard child; or to maintain one another in any matter, whether it be true or false.[1257]

This passage reveals the discursive strategy and purpose of Hawkins in beginning this section the way he did. He rhetorically argues some points that are not going to be accepted, to finally give in and introduce a new definition that picks up his two previous points (that confederacy and consequential damage can be the grounds of the writ). It shows the way in which the spaces generated by the arguments[1258] blend into a new space unknown until now: a common law offence defined as 'a confederacy to wrongfully prejudice a third person.' Thus, we have elements of the Definition of Conspirators, or the idea of a 'punishable association,' and we also have elements of the action on the case, that is the idea that the purpose of such association to be punishable should be to wrongfully injure a person.

With this blend, Hawkins is able to place the case-law derived from the *Poulterers' Case* within a new category. That is, instead of deriving it from the offense of conspiracy, he creates a wider offense including the statutory one, and all the other cases that did not fit in the frame of the false accusation (such as the *Starling Case*). But this is the first time that these are mentioned as a common law offense (note that this is not the same as Coke's conspiracy, which was rather the plot). However, it should be noted that although the *Poulterers' Case* was cited here as an instance of such offense, the very same case is

[1257] Ib.

[1258] If we start mapping the writ against the Definition of Conspirators as reference frame (the association to falsely accuse without regard to actual prosecution) and that if we continue with the mapping of writ onto action on the case (the writ as grounded on damages to the person caused by prosecution independently of acquittal).

mentioned earlier as an example that his opinion that bare conspiracies are punishable under the Definition of Conspirators is not "wholly unsupported by authority."[1259]

This new category allows Hawkins to reconsider several issues from a new viewpoint. In so doing he is, in fact, blending all other categories into one single larger concept, that of the wrongful confederacy.

This new offense allows Hawkins to strike new arguments against old defenses. Thus, he creates a mental space where there is a hypothetical "confederacy to carry on a false and malicious prosecution."[1260] This space is within the frame of malicious prosecutions, where defenses against an action are that "the indictment or appeal which was preferred, or intended to be preferred, in pursuance of it, was insufficient… or that the matter of the indictment did import no manner of scandal, so that the party grieved was in truth in no danger of losing either his life, liberty, or reputation."[1261] However, within the new space of the common-law confederacy, these defenses do not hold because "notwithstanding the injury intended to the party against whom such confederacy is formed, may perhaps be inconsiderable, yet the association to pervert the law in order to procure it, seems to be a crime of a very high nature, and justly to deserve the resentment of the law."[1262] Put differently, it is a *confederacy to wrongfully prejudice a third person*.

Likewise, coming back to the issue of the policy of the law, Hawkins can reframe it in terms of the common-law confederacy, that is, mapping the policy domain onto the common law confederacy. Thus, concerning the defense of immunity of prosecutors, Hawkins now thinks that it is not a good defense "that nothing more was intended by him, but only to give his testimony in a legal course of justice *against the party whose prejudice* such *confederacy* is supposed to have been formed for." [1263]

[1259] Ib.

[1260] Ib. s 3.

[1261] Ib. s 2.

[1262] Ib. s 3.

[1263] Ib. s 4.

The same thing happens with the defense of reasonable cause from the action on the case frame that now becomes blended into the wider frame of the offense of common law confederacy (note that this does not mean that the statutory conspiracy derives from this, but rather that it is understood in these terms, or framed or organized this way). Thus, Hawkins argues that

> no *confederacy whatsoever* to maintain a suit can come within the danger of the statute, unless it be both false and malicious. For it would be a most dangerous discouragement of all legal prosecutions, if those who engage in them upon a probable cause, should be in danger of being found guilty of so heinous a crime… and from the same ground it follows, that if the defendants in a writ of conspiracy can shew a probable cause of suspicion, they shall be discharged." (s 7) (also note elements of the writ and statute frame).

Thus, we can now understand why Hawkins classified conspiracy the way he did, as a misdemeanor "infamous and grossly scandalous, proceeding from principles of downright dishonesty, malice, or faction.

CONCLUSIONES

Como se mencionó en las páginas que abrían esta tesis, la historia del delito de conspiración en la tradición del *common law*, como la historia de esa tradición en general, es un laberinto en el que uno puede acabar perdido para siempre, probablemente devorado por el minotauro. Precisamente, una de mis preocupaciones desde el principio ha sido conseguir un hilo de Ariadna que me ayudara a encontrar la salida. El de la historiografía de este delito ha sido determinar cuándo surge el delito de common law, si en la Edad Media (a la vista del capítulo segundo, esta tesis casi se puede ya descartar), si en la Moderna, si en el siglo XIX. El mío ha sido la lingüística cognitiva.

Con dicho apoyo teórico, he tratado de mostrar cómo podemos explicar el tránsito desde la aparición del término *conspiracy* vinculado al concepto de corrupción del proceso en la Edad Media hasta su moderno sentido de tentativa. En otras palabras, he tratado de mostrar que, a través de un incesante proceso de integración conceptual, el dominio conceptual de dicho término ha ido incorporando elementos de otros ámbitos conceptuales en los que se proyectaba mediante la analogía. Sólo de esa manera podemos apreciar parentelas conceptuales que de otra manera permanecerían ocultas. En nuestro caso, hemos podido apreciar en qué medida la forma moderna del delito de *conspiracy* tiene una genealogía que la vincula al concepto de homicidio, al de *high treason* y al de difamación.

Claro está que muchas cosas quedan todavía pendientes de explicación. En ese sentido, con esta tesis se abren nuevos caminos que pretendo recorrer en el futuro inmediato. Por supuesto, hay que completar el cuadro histórico de la genealogía del delito con el desarrollo jurisprudencial y legislativo del mismo durante los siglos XVIII, XIX y XX. Y urge clarificar qué lugar ocupa en esa genealogía la aplicación del delito de conspiración a las asociaciones de trabajadores en el siglo XIX de la que hablé en el primer capítulo. Por no decir que la historia de la genealogía conceptual del delito de conspiración no puede detenerse en las islas. El delito fue trasplantado a las colonias. En particular, el desarrollo jurisprudencial del delito en los EE. UU es también complejo y conecta la genealogía del delito a la Sherman Antitrust Act (1890).

En el plano teórico también se abren nuevas posibilidades. Salta a la vista que el planteamiento de esta tesis tiene mucho de experimental. Por lo tanto, doy por descontado que una vez recoja los resultados de ese primer intento de escribir una historia conceptual razonada, quedará un largo periodo de ajuste y nuevos experimentos. Porque no era esta la sede, ni tampoco había tiempo para más, he desistido de pergeñar una teoría de la lingüística cognitiva aplicada al ejercicio de la historia. De hecho, no tiene sentido tratar de elaborar tal teoría en abstracto sin ver que problemas surgen al aplicarla a casos concretos como el de la historia del delito de conspiración.

En ese sentido, uno de los problemas que se presentan y que habrá que afrontar es el de casar el relato histórico con la explicación lingüística de manera que estén integrados y no sea una mera yuxtaposición de ambos. No es cuestión baladí. El conocimiento histórico, la historia como disciplina, tiene más de conocimiento de experto que de saber científico. Con ello no me refiero a la manera en que se razone o argumente con evidencia una tesis historiográfica. Me refiero a que si uno preguntara a un historiador en qué fundamenta su comprensión de una fuente, probablemente no sabrá qué decir. Se trata de un conocimiento tácito, por usar la terminología de Polanyi, que tras años acopiando información histórica, permiten al historiador interpretar una fuente en la plenitud de su significado. O, por ponerlo en otras palabras, el conocimiento histórico es, ante todo, erudición. Por eso, los historiadores deben contarse entre los pocos profesionales que continúan mejorando con la edad. En ese sentido, no existe la historia como conocimiento, sino grados de ignorancia histórica.

Sin erudición, las fuentes permanecen en silencio. Pero, una vez comienzan a hablar, podemos quedarnos escuchando embelesados, y dar luego cuenta respetuosa de lo que nos dijeron. O bien, podemos dejar la historia de lado y tratar explicar algún aspecto de nuestra condición de humanos como por ejemplo el derecho. Para ello necesitamos teorías. Ahora bien, dado que hemos dejado la historia de lado, y puesto que historia es erudición, inevitablemente la explicación que demos va a tener un elemento idiosincrático, invisible, que la alimenta pero que no aparece en ella. En otras palabras, parte de la explicación será ese conocimiento tácito que está interpretando la fuente. Con lo que al final volvemos al punto de partida.

Queda, por lo tanto, un largo camino por recorrer hasta encontrar el minotauro de la historia del delito de conspiración en la tradición del *common law*. Y si se encontrara, habrá que construir una teoría a partir de las piedras que formaban el laberinto.

BIBLIOGRAPHY

Abels, Richard. "What has Weland to Do with Christ? The Franks Casket and the Acculturation of Christianity in Early Anglo-Saxon England." *Speculum* 84 (2009): 549-581.

Baker, J. H. *An Introduction to English Legal History.* 4th. London: Butterworths, 2002 [1974].

Baker, J. H., ed. *The Reports of Sir John Spelman.* Vol. 2. London: Selden Society, 1978.

Bellamy, J. G. *Bastard Feudalism and the Law.* London: Routledge, 1989.

Bellamy, J. G. *The Criminal Trial in Later Medieval England.* Toronto, Buffalo: University of Toronto Press, 1998.

Blackstone, W. Commentaries on the Laws of England. 15th. Vols. 1-4. Edited by Edward Christian. London: Printed by A Strahan, Law-Printer to the King's Most Excellent Majesty, For T. Cadell and W. Davies, in the Strand, 1809 [1769].

Bloch, Marc. *Feudal Society.* Vol. 1. London; New York: Routledge, 1965.

Bracton online. HTLM version of Bracton, Henry de. *On the Laws and Customs of England.* Latin edition by George E. Woodbine. Translated by Samuel E. Thorne. Cambridge (Mass.): Belknap Press in Association with the Selden Society, 1968. Last modified April 2003. http://bracton.law.harvard.edu/

Brand, Paul, ed. "Edward I: Parliament of 1290, Text and Translation." In *The Parliament Rolls of Medieval England*, edited by C. Given-Wilson et al. CD-ROM. Scholarly Digital Editions: Leicester, 2005.

Brand, Paul, ed. "Edward I: Parliament of 1302, Appendix: Original Petitions and Related Material for Roll 2, Text and Translation." In *The Parliament Rolls of Medieval England*, edited by C. Given-Wilson et al. CD-ROM. Scholarly Digital Editions: Leicester, 2005.

Brand, Paul, ed. "Edward I: Parliament of 1302, Text and Translation." In *The Parliament Rolls of Medieval England*, edited by C. Given-Wilson et al. CD-ROM. Scholarly Digital Editions: Leicester, 2005.

Brand, Paul, ed. "Edward I: Parliament of 1305, Text and Translation." In *The Parliament Rolls of Medieval England*, edited by C. Given-Wilson et al. CD-ROM. Scholarly Digital Editions: Leicester, 2005.

Brand, Paul, ed. "Edward I: Parliament of 1305, Appendix to Roll 12: Original Petitions and related materials, Text and Translation." In *The Parliament Rolls of Medieval England*, edited by C. Given-Wilson et al. CD-ROM. Scholarly Digital Editions: Leicester, 2005.

Brand, Paul, ed. "Edward I: Parliament of 1306, Appendix: Additional Information and Related Material for Roll 6, Text and Translation." In *The Parliament Rolls of Medieval England*, edited by C. Given-Wilson et al. CD-ROM. Scholarly Digital Editions: Leicester, 2005.

Brand, Paul, ed. "Edward I: Parliament of 1306, Text and Translation." In *The Parliament Rolls of Medieval England*, edited by C. Given-Wilson et al. CD-ROM. Scholarly Digital Editions: Leicester, 2005.

Brand, Paul, ed. "Edward I: Parliament of 1307, Text and Translation." In *The Parliament Rolls of Medieval England*, edited by C. Given-Wilson et al. CD-ROM. Scholarly Digital Editions: Leicester, 2005.

Bryan, James Wallace. *The Development of the English Law of Conspiracy*. Baltimore: Johns Hopkins Press, 1909.

Burn, Richard. Ecclesiastical Law. 2nd. Vol 1. London: Printed by H. Woodfall and W. Strahan, Law Printers to the King's most Excellent Majesty; For A. Millar; and Sold by T. Cadell, opposite Catherine-Street, in the Strand, 1767.

Cam, Helen M. *Studies in the Hundred Rolls: Some Aspects of Thirteenth Century Administration.* Vol. 11 of *Oxford Studies in Social and Legal History*, edited by Paul Vinogradoff. Oxford: Oxford University Press, 1921.

Cam., Helen M., ed. *The Eyre of London 14 Edward II (A. D. 1321)*. Vol. 1. *In Year Books of Edward II.* Vol 26 (Part 1). London: Bernard Quaritch 11 Grafton Street, 1968.

Coke, Edward. The Second Part of the Institutes of the Laws of England. London: Printed for E. and R. Brooke, Bell-Yard, Near Temple Bar, 1797 [1642].

Coke, Edward. The Third Part of the Institutes of the Laws of England. London: Printed for E. and R. Brooke, Bell-Yard, Near Temple Bar, 1797 [1644].

Conspiratio. In *Thesaurus Linguae Latinae*. Edited by Deutsche Akademie der Wissenshaften. Leipzig; Munich: B. G. Teubner; K. G. Saur Electronic Publishing, 2006 [1906].

Cornish, William, Lobban, Michael, and Smith, Keith. *1820-1914: English Legal System.* Vol. 11 of *The Oxford History of the Laws of England.* New York: Oxford University Press, 2010.

Criminal Code Bill Commission. *Report of the Royal Commission Appointed to Consider The Law Relating to Indictable Offences.* London:

George Edward Eyre and William Spottiswoode, Printers to the Queen's most Excellent Majesty, for her Majesty's Stationery Office, 1879

Curthoys, Mark. *Government, Labour, and the Law in Mid-Victorian Britain*. New York: Oxford University Press, 2004.

Dicey, Albert Venn. "The Combination Laws as Illustrating the Relation Between Law and Opinion in England During the Nineteenth Century." *Harvard Law Review* 27 (1904): 511-532.

Erle, William. *The Law relating to Trade Unions.* London: Macmillan and Co., 1869.

Evans, Vyvyan, and Melanie Green. *Cognitive Linguistics. An Introduction.* Edinburgh: Edinburgh University Press, 2006.

Fauconnier, Gilles, and Mark Turner. *The Way We Think. Conceptual Blending and the Mind's Complexity.* New York: Basic Books, 2002.

Fauconnier, Gilles. *Mappings in Thought and Language.* Cambridge: Cambridge University Press, 1997.

Fifoot, C. H. S. *History and Sources of the Common Law. Tort and Contract.* London: Stevens & Sons Limited, 1949.

Fillmore, Charles J., and Collin Baker. "A Frames Approach to Semantic Analysis." In *The Oxford Handbook of Linguistic Analysis*, edited by Bernd Heine and Heiko Narrog. Oxford: Oxford University Press, 2009.

Fitzherbert, Anthony. The New Natura Brevium. 17th. London: Printed for Henry Lintot, Law-Printer to the King's most Excellent Majesty; and Sold by J. Shuckburch, at the Sun next *Richard's* Coffe-house in Flee-street, 1755 [1534].

Fletcher, George P. *Rethinking Criminal Law*. Boston; Toronto: Little, Brown and Co., 1978.

Fletcher, George P. *Rethinking criminal law*. Boston: Little, Brown and Co., 1978.

Fletcher, Richard A. *The Barbarian Conversion: From Paganism to Christianity.* Berkley; Los Angeles: California University Press, 1999.

Foster, M. A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery for the Trial of the Rebels in the Year 1746 in the County of Surry. Oxford: Clarendon Press, 1762.

Fredona, Robert. "Political Conspiracy in Florence, 1340-1382." PhD Diss., University of Cornell, 2010.

Friedland, M. L. "R. S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law." *Oxford Journal of Legal Studies* 1 (1981): 307-346.

Geary, Patrick J. "Extra-Judicial Means of Conflict Resolution." In *La giustizia nell'alto medioevo (secoli V-VIII)*, 569-601. Spoleto: Centro italiano di studi sull'alto medioevo, 1995.

George, M. Dorothy- *The Combination Laws Reconsidered.* Vol. 1 of *Economic History (A Supplement to the Economic Journal)*, edited by J. M. Keynes and D. H. Macgregor. London: Macmillan and Co., Limited: 214-228.

Hale, Mathew. Historia Placitorum Coronae. Vols. 1-2. London: Printed by E. and R. Nutt, and R. Gosling, (Assigns of Edward Sayer, Esq;) for F. Gyles over-against Grays-Inn in

Holborn, T. Woodward at the Half-Moon between the Two Temple-Gates in Fleet-street, and C. Davis in Pater-noster-row, 1736.

Harding, Alan. "The Origins of the Crime of Conspiracy." *Transactions of the Royal Historical Society* 33 (1983): 89-108.

Harding, Alan. The Roll of the Shropshire Eyre of 1256. London: Selden Society, 1981.

Hawkins, W. A Treatise of the Pleas of the Crown. 8th. Vols. 1-2. Edited by John Curwood. London: Printed for S. Sweet, 3, Chancery Lane; R. Pheney, Inner Temple-Lane; A Maxwell, 21, and R. Stevens and Sons, 39, Bell Yard, Lincoln's Inn; Law Booksellers and Publishers, 1841.

Hedges, R. Y., and Winterbottom, Allan. *The Legal History of Trade Unionism.* London; New York; Toronto: Longmand, Green, and Co., 1930.

Helmholz, R. H. *Select Cases on Defamation to 1600*. London: Selden Society, 1985.

Helmholz, R. H. *The Canon Law and Ecclesiastical Jurisdiction from 597 to the* 1640s. Vol. 1 of *The Oxford History of the Laws of England.* Oxford: Oxford University Press, 2004.

Hicks, Michael. "Ashley, Sir Anthony, baronet (1551/2–1628)." First published 2004. Online edition, Jan 2008. Oxford DNB http://dx.doi.org/10.1093/ref:odnb/757

Holdsworth, W. S. *A History of English Law.* 2nd. Vol. 5. London: Methuen & Co. Ltd, 1945[1924].

Holdsworth, W. S. *A History of English Law.* 3rd. Vol. 2. London: Methuen & Co. Ltd, 1923.

Holdsworth, W. S. *A History of English Law.* 3rd. Vol. 3. London: Methuen & Co. Ltd, 1923 [1903].

Holdsworth, W. S. *A History of English Law.* Vol. 11. London: Methuen & Co. Ltd, 1938.

Holdsworth, W. S. *A History of English Law.* Vol. 8. London: Methuen & Co. Ltd, 1925.

Hudson, William. "A Treatise on the Court of Star-Chamber." 1625. In Vol 2 of *Collectanea Juridica*, edited by F. Hargrave, 1-240. London: Printed for E. And R. Brooke, Bell-Yard, Temple-Bar, 1792

Illich, Ivan. "The Cultivation of Conspiracy." In *The Challenges of Ivan Illich: A Collective Reflection*, edited by Lee Hoinacki and Carl Mitcham, 233-242. New York: State University of New York Press, 1965.

Jenks, Susanne. "The Writ and Exception de odio et atia." *Journal of Legal History* 23 (2002): 1-22.

Kiralfy, A. K. *The Action on the Case*. London: Sweet & Maxwell, Ltd., 1951.

La Fave, W. & Scott Jr. Austin. Criminal Law. 2nd. St. Paul, Minn.: West Publishing, 1986.

Lakoff, George, and Mark Johnson. "Conceptual Metaphor in Everyday Language." *The Journal of Philosophy* 77 (1980): 453-486.

Langbein, John H., Renée Lettow Lerner, and Bruce P. Smith. *History of the common law: the development of Anglo-American legal institutions*. Austin: Wolters Kluwer Law & Business, 2009.

Macnair, Mike. "Free Association versus Juridification." *Critique* 39 (2011): 53-82.

Maitland, F. W, Harcourt, L. W. V., and Bolland, W. C. eds. *The Eyre of Kent. 6 &7 Edward II (A. D. 1313-1314).* Vol 1. In *Year Books of Edward II*. Vol 5. London: Bernard Quaritch, 11 Grafton Street, W. 1910

Maitland, F. W. Pleas of the Crown for the County of Gloucester. London: Macmillan and Co., 1884.

Maitland, F. W., and Pollock, Frederick. The History of English Law Before the Time of Edward I. Vol. 2. Cambridge: Cambridge University Press, 1898.

March, John. *Actions for Slaunder*. London: Printed by F.L. for M. Walbank and R. Best, 1647.

Mead, Margaret. "Introduction." In *Cooperation and Competition Among Primitive Peoples*, edited by Margaret Mead. New York; London: McGraw-Hill Book Company, Inc., 1937.

Milsom, S. F. C. *Historical Foundations of the Common Law.* 2nd. London: Butterworths, 1981 [1969].

Musson, Anthony. "Twelve Good Men and True? The Character of Early Fourteenth-Century Juries." *Law & Hist. Rev.* 15 (1997): 115-144.

Müller-Boysen, Carsten. "Factors for the Protection of Merchants in Early Medieval Northern Europe." *Journal of the North Atlantic* 8 (2016): 210-215.

Nichols, Francis Morgan, ed. *Britton. An English Translation and Notes.* Washington: John Byrne & Co., 1901.

Oexle, Otto Gehard. "Peace through Conspiracy." In *Ordering Medieval Society,* edited by Bernhard Jussen, 285-322. Philadelphia: University of Pennsylvania Press, 2001.

Orth, John V. *Combination and Conspiracy. A Legal History of Trade Unionism*. New York: Oxford University Press, 1991.

Paris, Matthew. *English History.* Translated by J. A. Giles. Vol. 2. London: Henry G. Bohn, York Street, Covent Gardent, 1853 [1250-1255].

Puckett, Theodore F. T. *A Concise History of the Common Law.* 5th. Boston: Little, Brown and Co., 1956 [1929].

Radin, Max "Maintenance by Champerty." *California Law Review* 24 (1935): 48-78.

Rastell, John. *An exposition of certaine difficult and obscure words, and termes of the lawes of this realme...* London: Printed by th'assignee of Charles Yetsweirt Esq. deceased, 1595 [1536].

Redman, Robert ed. *Britton.* London: Imprinted at London in Flete streete by me Robert Redman dwellyng in saynt Dunstones paryshe at the signe of the George, 1540

Rushworth, John. "Historical Collections: 1639, March-June." In *Historical Collections of Private Passages of State: Volume 3, 1639-40.* 885-946 London, 1721. British History Online. Accessed July 21, 2016. http://www.british-history.ac.uk/rushworth-papers/vol3/pp885-946

Rushworth, John. "Star Chamber Reports: 1 Charles I." In *Historical Collections of Private Passages of State: Volume 3, 1639-40.* 1-4. London: D Browne, 1721. British History Online. Accessed October 12, 2015, http://www.british-history.ac.uk/rushworth-papers/vol3/pp1-4

Sayles, G. O, ed. *Select Cases in the Court of King's Bench under Edward I*. Vol 1. London: Bernard Quaritch, 11 Grafton Street, W., 1936.

Sayles, G. O, ed. *Select Cases in the Court of King's Bench under Edward I*. Vol 2. London: Bernard Quaritch, 11 Grafton Street, W. 1938.

Sayles, G. O. Select Cases in The Court of King's Bench under Edward I. Vol. 3. London: Bernard Quaritch, 11 Grafton Street, W., 1939.

Sayles, G. O. "The Dissolution of a Guild at York in 1306." *The English Historical Review* 55 (1940): 83-98.

Sayre, Francis B. "Criminal Attempts." *Harvard Law Review* 41 (1921): 821-859.

Shoemaker, Robert B. "The Decline of Public Insult in London 1660-1800." *Past and Present* 169 (2000): 97-131.

Smith, K. J. M. *James Fitzjames Stephen. Portrait of a Victorian Rationalist.* Cambridge: Cambridge University Press, 1988.

Staunford, W. *Les Plees del Coron divisees in plusiours titles*. London: Richard Tottell, 1574.

Stephen, James Fitzjames. "English Jurisprudence." *The Edinburgh Review* 114 (1861): 456-486.

Stephen, James Fitzjames. "The Law of Conspiracy." *Pall Mall Gazette*, April 17, 1873.

Stephen, James Fitzjames. *A Digest of the Criminal Law*. 4th. London; New York: Macmillan and Co., 1887 [1877].

Stephen, James Fitzjames. *A General View of the Criminal Law of England.* London; Cambridge: MacMillan and Co., 1863.

Stephen, James Fitzjames. *A History of the Criminal Law of England.* 3 Vols. London: Macmillan and Co., 1883.

Thorpe, Benjamin, ed. *Ancient Laws and Institutes of England.* Vol. I. 2 vols. London: Record Commission, 1840.

Weber, Max. *Economy and Society*. Edited by Guenther Roth and Claus Wittich. Vol. 2. Berkley; Los Angeles; London: University of California Press, 1968

Whittaker, William Joseph, ed. *The Mirror of Justices.* London: Bernard Quaritch, 15 Piccadilly, 1895.

Winfield, H. P. *The History of Conspiracy and Abuse of Legal Procedure.* Cambridge: Cambridge University Press, 1921.

Winfield, P. H. *The Present Law of Abuse of Legal Procedure*. Cambridge: Cambridge University Press, 1921.

Wright, R. S. *Drafts of a Criminal Code and a Code of Criminal Procedure for the Island of Jamaica, with an Explanatory Memorandum*. London: Printed by George Edward Eyre and William Spottiwoode, Printers to the Queen's Most Excellent Majesty, for Her Majesty's Office, 1877.

Wright, R. S. *The Law of Criminal Conspiracies and Agreements.* Philadelphia: The Blackstone Publishing Company, 1887 [1873].